TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 303

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR CERTIORARI FILED AUGUST 6, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,434)

(34,434)

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[fol. 1] [Caption omitted]

[fol. 2]

IN DISTRICT COURT OF RENO COUNTY

No. 17687

MRS. MABEL G. TOOPS et al., Plaintiffs,

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, Defendant

NOTICE OF APPEAL—Filed May 31, 1928; in Supreme Court June 1, 1928

To Mabel G. Toops and her attorneys of record, Carr W. Taylor and James N. Farley:

You will take notice that the defendant herein appeals to the Supreme Court of the State of Kansas, from the judgment rendered in this case on the 26th day of May, 1928, and from each and every part thereof.

Wm. R. Smith, Wm. Osmond & J. S. Simmons, Attorneys for Defendant.

Service of the above notice of appeal is hereby acknowledged this 31st day of May, 1928.

Carr W. Taylor, James N. Farley, Attorneys for Plaintiff.

File endorsement omitted.

[fol. 3] IN DISTRICT COURT OF RENO COUNTY

No. 17687

MRS. MABEL G. TOOPS et al., Plaintiffs,

—

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, Defendant

JUDGMENT—Filed May 31, 1928; in Supreme Court June 1, 1928

Now on this 23rd day of April, 1928, this caouse came regularly on for trial, the plaintiff being present in person

and by her attorneys, Carr W. Taylor, and James N. Farley, and the defendant, The Atchison Topeka & Santa Fe Railway Company, being present by its attorneys John S. Simmons, and William Osmond. Thereupon both parties announced themselves ready for trial, and a jury of twelve good and lawful men was duly empaneled and sworn to well and truly try said cause and a true verdict render upon the evidence and the instructions of the court.

Thereupon said plaintiff introduced her evidence and rested, and thereupon the said defendant interposed a demurrer to plaintiff's evidence, which demurrer was by the court overruled and exceptions allowed. Thereupon said defendant introduced its evidence in rebuttal and rested, and thereupon the defendant moved the court to instruct the jury to return a verdict for the defendant for the reason that under the evidence in the case the defendant was entitled to a verdict, which motion was by the court overruled.

The court then instructed the jury as to the law of the case and said cause was argued by both counsel for plaintiff and defendant, and said cause was submitted to said jury for their determination. Thereupon the jury was [fol. 4] placed in charge of a sworn officer and taken to the jury room, and thereafter on the 25th day of April 1928, said jury returned into court the following verdict which is in the words and figures as follows to-wit:

"We, the jury empanelled and sworn in the above entitled case, do upon our oaths find for the plaintiff and assess the amount of her recovery at the sum of Twenty Two Thousand Seven Hundred Fifty and no/100 Dollars.

(Signed) C. C. Alexander, Foreman."

Said jury also returned into court the following special interrogatories with the answers thereto submitted by the court, to-wit:

"Q. No. 1. Was M. G. Toops, the deceased, in charge of the train and switching operations at and before the time he was killed?

"A. No. 1. Yes.

"Q. No. 2. a. Was M. G. Toops killed by coming into contact with the 15 grain cars that were being placed on the elevator track?

"b. If you answer the preceding question, 'Yes,' state which car, if any, struck Toops.

"A. No. 2. The 1st car on west end of the 15 grain cars.

"Q. No. 3. Were there any marks of blood on the rear car of the 15 grain cars?

"A. No. 3. There was no direct evidence to show there was or was not.

"Q. No. 4. Were there marks of blood on the south wheels of all the other grain cars except the rear car?

"A. No. 4. Yes.

[fol. 5] "Q. No. 5. Did Toops know of the coming on the elevator tract of the 15 grain cars?

"A. No. 5. He knew they were to come.

"Q. No. 6. Was conductor Toops supplied with a good lantern?

"A. No. 6. He had a good lantern.

"Q. No. 7. If you answer Q. No. 6 in the affirmative then state if he could have by the aid of said lantern seen the approaching cars.

"A. No. 7. No.

"Q. No. 8. Had not Toops frequently worked on the Elkhart Branch from Dodge City to Elkhart?

"A. No. 8. Yes.

"Q. No. 9. Had the yards at Rola, Kansas, been materially changed since he worked on said line?

"A. No. 9. We don't know.

"Q. No. 10. State fully in what the negligence of the defendant consisted, if any?

"A. No. 10. First, in not protecting rear end of 15 grain cars, second, in engineer not sounding signal when starting to back cars around curve, and through cut; third, poor condition of tract at derail switch.

(Signed) C. C. Alexander, Foreman.

Thereupon said defendant on the 27th day of April, 1928, files its Motion to set aside findings and for judgment, and also filed its Motion for a New Trial. And thereafter on the 26th day of May, 1928, said cause came on to be heard [fol. 6] before the court upon said Motion to set aside findings and for judgment, and Motion for New Trial, and the court after hearing the arguements of counsel and being fully advised in the premises does hereby overrule each of said Motions as to each and every ground thereof.

It is therefore considered, ordered and adjudged by the court that the plaintiff do have and recover of and from the said defendant the amount of said verdict, to-wit $22,750.00, together with 6 per cent interest thereon from this date, together with the costs of this suit taxed at $326.55 for which let execution issue.

All of which is ordered and adjudged.

W. G. Fairchild, Judge.

O. K. Carr W. Taylor, James N. Farley, Attorneys for Plaintiff.

O. K. Wm. R. Smith, Wm. Osmond, J. S. Simmons, Attorneys for Defendant.

Clerk's certificate to foregoing papers omitted in printing.

[fols. 7 & 8] [File endorsement omitted.]

[fol. 9] [File endorsement omitted.]

[fol. 10] IN SUPREME COURT OF KANSAS

No. 28499

MABEL G. TOOPS, Administratrix of the Estate of M. G. Toops, Deceased, Appellee,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant

Appeal from Reno County District Court, Hon. W. G. Fairchild, Judge

Abstract of the Record on Behalf of Appellant—Filed July 9, 1928

On February 26, 1927, the above-named appellee filed her petition in the above-entitled cause, which, omitting caption, reads as follows:

PETITION

I

Comes now Mrs. Mabel G. Toops, Administratrix of the Estate of M. G. Toops, deceased, and states that she was

on the 24th day of February, 1927, appointed administratrix of the estate of said M. G. Toops, deceased, by the Honor-
[fol. 11] able Probate Court of Douglas County, Kansas, and that she is now the duly appointed, qualified and acting administratrix of said estate, and that this action is brought under the Federal Liability Act by said administratrix on behalf and for the benefit of herself as widow of M. G. Toops, deceased, and on behalf and for the benefit of Marthelle G. Toops, minor daughter of M. G. Toops, deceased.

II

The plaintiff further states that the defendant, The Atchison, Topeka & Santa Fe Railway Company, is a corporation, organized under the laws of the State of Kansas, with its principal office at Topeka, Kansas; that it conducts and operates a railway line from the city of Chicago, Illinois, through the states of Illinois, Iowa, Missouri, Kansas, Colorado and other points westward to Los Angeles and San Francisco, California, and also from Chicago, Illinois, via Newton, Kansas, to Galveston, Texas; that it also operates an interstate line extending from Elkhart, Morton County, Kansas, via Dodge City, Kansas, to interstate points upon defendants line of railway; that said defendant was at all times hereinafter mentioned, engaged in interstate commerce, in the transportation of freight and goods and passengers from the state of Kansas to other states of the United States and foreign countries.

III

Plaintiff further states that the said M. G. Toops, employed as a conductor by said Atchison, Topeka & Santa Fe Railway Company, was killed at Rolla, Kansas, on the 13th day of August, 1926, at about 1:00 o'clock a. m. of said day, by reason of the negligence of the above-named defendant, The Atchison, Topeka & Santa Fe Railway Company, its officers, agents, servants and employes as hereinafter specifically alleged.
[fol. 12]

IV

Plaintiff further alleges that for approximately eleven (11) years prior to the said 13th day of August, 1926, the

said M. G. Toops, deceased, was in the service of the defendant, first as a brakeman and afterwards as a conductor; that the said M. G. Toops as such conductor on the evening of August 12, 1926, was in charge of a freight train made up of and containing many cars of freight for transportation from Elkhart, Kansas, and other stations on said line to Dodge City, Kansas, and to points outside of the state of Kansas; that the said freight train arrived at Rolla, a station on defendant's line situated in Morton County, Kansas, northeast of Elkhart, Kansas, at about 12:15 a. m. on the morning of August 13, 1926; that said Conductor M. G. Toops was in full charge of said train and had received orders to take up five (5) cars of grain, four (4) of which were billed to Kansas City in the state of Missouri and were therefore interstate shipments; that these cars were standing on what is known as the elevator track in the yards at Rolla, Kansas; that the said Conductor Toops and the train crew switched said five (5) loaded grain cars from said elevator track to the main line of said railroad and placed same into said interstate train for transportation to points in other states; that the said M. G. Toops had further orders to set in on said elevator track for loading with grain for interstate shipment fifteen (15) grain cars which were standing upon what was known as the passing track, the northernmost track in said yards at Rolla, Kansas, and just west of approximately fifteen (15) stock cars also standing upon said passing track; that they caused the engine on said train to back up on said passing track and couple with said stock cars, back said cars to a coupling with said grain cars, then pulled said stock and grain cars, out onto the main line track, and lined the switches up to divert the cars to the elevator track. That while the engine and the [fol. 13] 12 stock cars and the 15 grain cars were on the main line track and the switches were thus lined to lead on to the elevator track, the rear brakeman Hemphill being at that time on the south side of the main line track and east of the cross-over switch, gave to the engineer a kick-in signal; that said kick-in signal was negligently, carelessly and recklessly given in that at the time it was given, Hemphill did not know the whereabouts of Conductor

Toops, did not look to see where he was, and that if he had looked he would have seen Conductor Toops and could have given him a signal or warning that the kick-in was about to be made; that without ascertaining the whereabouts of Toops, Hemphill gave to the engineer the kick-in signal and the engineer in obedience thereto started to propel his engine backwards with the intention of shoving the 15 grain cars on down the main line track and on to the elevator track; that Hemphill remained on the ground at the cross-over switch when the cot or kick-in should have been made and thereby divert the 12 stock cars back over on to the passing track; that the head brakeman Nolan during this time was on the south side of the track and 4 or 5 car lengths east of the cross-over switch at the passing track, and his duties, after the kick-in signal was given, were to make the cut between the 12 stock cars and the 15 grain cars and allow the grain cars to be kicked in on to the elevator track as aforesaid. That the track at this point and throughout the entire length of all of the tracks in Rolla, Kansas, is very dangerous in construction; that the same was negligently and carelessly constructed by the defendant company, its officers, servants, agents and employes in that it is skeletonized, that the surface of the ground next to the tracks is full of holes and pitfalls and had been allowed to grow up with weeds, and that the same were extremely dangerous and insecure to the workmen trying to operate trains of the defendant. That because of this dangerous condition of the track and [fol. 14] its environs, the head brakeman Nolan was unable to get on the train being backed as aforesaid in time to make the cut before the slack had run out; that he was therefore unable to make the cut, and separate the fifteen box cars from the twelve stock cars. It therefore became necessary for Hemphill to give the second kick signal, which he did, and the engineer in response thereto gave the cars a second kick. That at this time the entire train was moving at a speed of about 10 miles per our. In response to the second kick signal, Brakeman Nolan was able to make the cut and the 15 grain cars were separated from the engine and the 12 stock cars, and were kicked down the main line and in on to the elevator track.

Plaintiff alleges that the operation of said train as above described was a reckless, careless and negligent manner of operating said train on the part of the defendant, its officers, servants, agents and employes, in this, to-wit:

That at no time from the time the first kick-in signal was given by Brakeman Hemphill, was anyone on these 15 grain cars, until such time as shall be hereinafter set forth. That at no time during the operation of the train just described was Brakeman Hemphill or Brakeman Nolan in possession of knowledge of the whereabouts of Conductor Toops, although in the exercise of ordinary care they could have known his whereabouts; that at no time was any signal given by the engine or engine crew to Conductor Toops of their intention to kick in said 15 grain cars; that no whistle was blown; that no bell was rung; that there was no light on the west end of said 15 grain cars; that no brakeman or flagman was on the west end of said moving cars to give warning of the approach of the same onto and westward down said elevator tracks; that the tracks at Rolla, Kansas, at the point where the elevator track connects onto the main line track, made a very decided curve to the south; that there is a high bank at this point on the [fol. 15] south side of the track and that the view from the derail on the elevator track to the cross-over switch to the passing track is cut off; that the hill on the south side is 8 or 10 feet high; that the track at this point was skeletonized and was in a very dangerous condition as has been heretofore described; that the published rules of the defendant company provide that when cars are being rushed by an engine as hereinbefore described, a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need except when shifting or making up trains in yards. And the plaintiff alleges that there are no yards at Rolla, Kansas; that there are no yard limit boards in or near Rolla, Kansas; that there was no switch lights and no one on duty at night to assist in making switches or handling trains through said station; that all of these facts were well known to the members of the crew operating the train at the time of the death of Conductor Toops.

Plaintiff alleges that Conductor Toops after having coupled the air upon the 5 grain cars which had been put into the interstate train on the main track, walked over

to the east end of the depot and to a truck which was standing there, where he remained for a few minutes going through his order sheet; that as soon as he had completed that work, he proceeded east approximately 325 feet along the main line track and to a point north of the derail on the elevator track; that he was the conductor and in charge of said train; that as such conductor it was his duty to assist in spotting cars and switching the train; that this proper position was on the right hand side or the engineer's side of said train, which in this case was the south side; that in order to reach the south side of the train it was necessary for him to go south and cross the elevator track; that Conductor Toops, carefully, cautiously and [fol. 16] while in the line of his duty, proceeded to cross said elevator track at a point 3 or 4 feet east of the derail on said track with the intention of placing himself in position to assist at setting the cars to the elevators thereon; and that he was in the exercise of his duty in proceeding as above described; that the elevator track at this point, as has been heretofore described, was skeletonized and negligently constructed and in a dangerous condition; that the only light Conductor Toops had was the electric lantern which he carried in his hand; that it was necessary for him to carefully watch his footsteps; that just as he stepped on said elevator track, he was without warning struck by the west end of the 15 moving grain cars which had been negligently, carelessly and recklessly kicked in on to the elevator track by the engine crew in the manner hereinbefore described.

V

Plaintiff furthers alleges that said elevator track was negligently constructed and maintained by said defendant, its officers, agents, servants and employes in this, to-wit:

That at the place where Conductor Toops was killed on said elevator track, it was what is known as a skeleton track; that is, the railroad ties of the approximate dimensions of 6 inches thick, 8 inches wide and 8 feet long were laid on top of the ground, and the rails being approximately 4¾ to 5¼ inches high, were placed on top of the ties, the distance between the rails being 56 inches. That the ties were placed on the ground 8 to 10 inches apart. That no earth or ballast of any kind was placed between

or over the ties, and that this construction made said tracks unsafe for trainmen, especially at night in said unlighted yards; and that because of the space between the rails and the ties being vacant and unballasted, they were a trap and a snare for trainmen passing from one side of the track to the other; all of which was unknown to the said M. G. Toops, deceased.

[fol. 17] And plaintiff alleges that said negligent and dangerous construction of said track as above described was one of the contributing causes of the death of the said Conductor Toops, and that it was well known to the defendant, its officers, agents, servants and employes that said track was of the said skeleton construction, and was dangerous and insecure and was a snare and a trap to those crossing said track and more especially to those crossing said track in the night time.

VI

Plaintiff further alleges that at all the times hereinbefore mentioned, the said Conductor Toops at said Rolla, Kansas, was carrying an electric lantern which gave forth a bright light, and that said lantern was plainly visible to his fellow servants except when said Conductor Toops passed behind the west end of said string of box cars, at which time his lantern was burning brightly; and that it was the duty of the trainmen operating said train to observe the whereabouts of their fellow workmen, which at night are indicated only by their lanterns; and that it was the duty of the fellow servants to give signals to move said train only when the whereabouts of their fellow workmen were indicated by their lanterns; that the defendant, its officers, agents, servants and employes were guilty of negligence in this, to-wit:

That when the engine crew received the signal from the head brakeman who had given it without knowledge of the whereabouts of Conductor Toops, to kick in said string of grain cars for spotting at the elevators on the elevator track, the crew failed to ring the engine bell and failed to give the usual back-up or kick-in signal by whistle, and kicked said cars in on to the elevator track without giving any warning whatever to Conductor Toops that said train [fol. 18] was about to be kicked westward; and that not-

withstanding the fact that the night was very dark and that there were no lights in or near the tracks at Rolla, Kansas, to light up said elevator track, they kicked the cars as aforesaid and left them to roll in on to the elevator track of their own momentum with nobody on said cars or in charge thereof to give warning, and no lights of any kind or nature on or near them, and no warning of any kid or nature whatever of their approach.

Plaintiff alleges that as Conductor Toops in the line of his duty started to cross the elevator track as hereinbefore described, he was struck by the kicked-in cars as aforesaid, kicked in and operated by the defendant, its agents, officers, servants and employes, in the negligent manner hereinbefore described, and was knocked to the ground between the rails in the manner hereinbefore described at a point about 3 or 4 feet east of the derail on said elevator track; that his body was dragged along the ground between the tracks until his shoulders came to rest against the derail; that his head and right arm had fallen in such manner that they lay across the south rail of the elevator track and were severed from his body by the wheels of the rear car of said kicked-in cars; that when struck he threw his lantern to the south side of the track as a signal to the engine crew and brakeman to stop said cars; that there was no brakeman on said cars and the engine was not attached thereto and his signal was unobserved and met with no response; that his lantern lodged in the weeds and grass 2 or 3 feet from the rail; that he thereby met his death, and the sole and only causes therefor were the negligent, careless and reckless acts of the defendant, its officers, agents, servants and employes as hereinbefore set forth, in the operation of said train, and in the further negligence, carelessness and recklessness of the defendant, its officers, agents, servants and employes [fol. 19] in constructing the track at Dolla, Kansas, and allowing it to be and remain in the condition it was in at the time and place herinbefore mentioned and described.

Plaintiff alleges that at the time Conductor Toops was struck by the kicked in cars, they were proceeding quietly and not at a high rate of speed but at a rate of speed sufficient to carry them 2 or 3 car lengths beyond the place where Conductor Toops was struck and killed; that the enginemen after having kicked in the cars as hereinbefore

described threw the cross-over switch leading from the main line to the passing track and set the 12 stock cars back on the passing track, then took the engine back on to the main line track and proceeded to back into the 15 grain cars on the elevator track for the purpose of setting them to the elevators; that Rear Brakeman Hemphill rode the said 12 stock cars over to the passing track and set the brakes on them; that he then walked from the passing track over to the elevator and climbed upon the 15 grain cars at a point 4 or 5 car lengths from the place where Conductor Toops was lying dead; that he climbed up on top of said cars and gave the back-up signal to Head Brakeman Nolan, and Nolan in turn repeated it to the engineer, and the train was pushed backwards; that after giving the back-up signal Hemphill proceeded to walk in a westerly direction on top of the cars and towards the rear end of them; that Nolan walked to the second car from the engine and to the south side thereof in order to be in a position to see around the curve on the elevator track and better observe Hemphill and his signals; that just as the car upon which Nolan was standing was passing the derail, Brakeman Nolan saw the lighted lantern of Conductor Toops lying in the weeds, gave a violent stop signal, and the engineer stopped the train as soon as he could, but not until after the train had [fol. 20] proceeded westwards until the tender of the engine was over the body of Conductor Toops.

Plaintiff further alleges that by reason of the negligence of said defendant, its officers, agents, servants and employes as hereinbefore alleged, said Conductor Toops met his death in the manner and form set forth and to the plaintiff's damage as hereinafter stated.

VII

Plaintiff alleges that the said Conductor Toops was 37 years of age at the time of his death; that he was a healthy, cheerful, active, able-bodied man, and as a conductor was earning approximately the sum of Two Hundred Dollars ($200.00) per month; that his expectancy of life was approximately 30.35 years, according to the American Experience Table of Mortality; that at the time of his death, his widow, Mabel G. Toops, was of the tage of 36 years and had an expectancy of life of approximately 31 years; that

the said Marthelle G. Toops, his minor daughter, is of the age of 16 years; and that said widow and daughter were his sole and only heirs; that he died intestate; that said widow and daughter were dependent upon him for their support and maintenance; that they have no income, or property of their own from which they could derive support or income; that by the untimely death of said M. G. Toops, occasioned by the negligence of said defendant, its officers, agents, servants and employes, in the manner and form hereinbefore alleged, plaintiff's beneficiaries were and are damaged in the sum of Thirty-six Thousand Dollars ($36,000.00).

Wherefore plaintiff prays for judgment against the said defendant in the sum of $36,000.00 together with the costs of this action, and for such other and further relief as may to the court seem equitable and just.

[fol. 21] ANSWER

Comes now the defendant and for its answer to the petition of plaintiff says: That it denies each and every material allegation made by plaintiff; but admits that it is a corporation engaged in interstate commerce and that M. G. Toops, deceased, was a conductor in the employ of the defendant, and was killed on the date and at the station alleged, while engaged as a conductor in interstate commerce.

Defendant further alleges that the said M. G. Toops was killed through no negligence, omission, inattention, or want of care on its part, or on the part of any of its officers, servants, agents, or employees, but that his death was due to his own negligence, omission, and want of care.

Defendant further says that the said Toops received the injuries which resulted in his death while in the employ of the defendant as a conductor, and that such injuries were the result of the risks of his empolyment, which were assumed by the said M. G. Toops, and for which the defendant is not liable.

Wherefore, this defendant prays for judgment against the plaintiff herein for the costs of this action.

Reply

The reply consisted of a general denial of the allegations of the answer.

Trial

The case came on for trial on February 26, 1927, and was tried to the court and a jury, the plaintiff appearing in [fol. 22] person and by her attorneys, Carr W. Taylor and James N. Farley, the defendant appearing by William Osmond and John S. Simmons, its attorneys. Following is an abstract of the material evidence given on the trial.

Plaintiff's Evidence

The plaintiff introduced evidence as follows:

Mrs. Mabel G. Toops testified (Tr. 4, et seq.): My name is Mrs. Mabel G. Toops. I am the widow of Conductor Toops. At present I am living at Lawrence. I was appointed administratrix of the estate of M. G. Toops by the Probate Court of Douglas County. At the time of the death of Mr. Toops his family consisted of myself, himself and our daughter. I am 37 years of age. My daughter is 17. Mr. Toops, at the time he was killed, was 37 years of age, would have been 38 if he had lived until Christmas Day of 1926.

Andrew P. Nolan testified (Tr. p. 6, et seq.): My name is Andrew P. Nolan. At the present time I am living in the Disabled Volunteer Soldiers Hospital at Milwaukee. Have been there since the 6th of December, 1927. Before that time I was a switchman and brakeman for about fourteen years, and worked for several different roads. I worked for them under the name of Andrew P. Nolan, which is my real name. I was working for the Santa Fe Railroad at the time Mr. Toops was killed under the name of John McHenry. I went to work for them on July 24, 1926, and was on the run between Dodge City and Elkhart. At that time there was quite a grain rush. I first met Conductor Toops on the 11th day of August at Dodge City in the ca-

boose. He came over to bring his clothing to the caboose so that it would be there when he went out. We made the run [fol. 23] from Dodge City to Elkhart and the sixteen hours' rest was up at noon the following day. We were called for duty at 8:00 p. m. the night of the 11th and left Elkhart about ten o'clock. The train crew consisted of Engineer Hall, Fireman Phillips, Conductor Toops, Rear Brakeman Hemphill, and I was head brakeman. Rolla is the second station east of Elkhart. In going down we did no switching at Rolla. To the best of my recollection we didn't stop there. We left Elkhart about eleven or eleven thirty at night on the 12th day of August. We picked up four empty box cars at Wilburton to take to Feterita. We arrived at Rolla that night between 12:15 and 12:30, with the same train crew. (Exhibit 1, being a map of the location of the tracks at Rolla, was introduced, and identifed by the witness as being correct.) The most northerly track is the passing track which is connected up east of the cross-over into the stock track. The stock track extended east from the cross-over switch. The main line track runs right along parallel with the passing track on the south side. The depot was south of the main track. The house track was the next track south of the station, right behind the station. The elevator track was still further south, the most southerly track of all. The directions of the tracks are east and west. On the south side of the railroad there was a hill and a cut. The hill has been cut away to put in an elevator track. It was a sharp curve and bore to the south.

The first thing we did was to take the engine and the four cars which we picked up at Wilburton and went in on the elevator track and got five loads of grain which were billed out, and came back to the main track, and Conductor Toops made the coupling. The next thing that was done was to cut off the engine and went east on the main line to the east end of the stock track. We had to get fifteen grain cars that were behind twelve stock cars on the pas- [fol. 24] sing track. The stock cars extended up past the pass-over switch. I went to the east end of the stock track and came back through the stock track and made the coupling and shoved the cars back to clear the cross-over. Mr. Hemphill made the coupling, and I opened the cross-over switches. There was a road crossing back there that was

cut. There was another coupling back between the engine and the road crossing. The road crossing was west of the depot about four or five car lengths. I opened up the main track switch, the cross-over switches, and we pulled out to the main track and Mr. Hemphill gave me the kick signal. There were 27 cars, 12 stock cars next to the engine, and 15 empty grain cars on the rear end of the cut. They were pulled out so we could make the switch and kick those 15 grain cars down to the elevator track. After we made the stop Mr. Hemphill gave me the kick signal and knowing where the cut was I watched for it to get back to me, and by the time it got to me the cars were moving about ten miles an hour, and I was slow about getting on and I missed the pin. I was slow on account of the condition of the track, there were weeds there and the tracks were skeletonized and bad footing along there. After he gave me the second kick signal I made the cut and then he swung down and gave the stop signal, and at that time I was just about back to where he was standing at the cross-over switch. The kick sign is a sign to kick the cars enough to start them so you can cut them off and let them roll on their own accord, and let them move themselves down past a clearance point so you can accomplish another move without handling those cars over again. It is faster than shoving cars. Mr. Hemphill was standing at the cross-over switch at the main line that leads back into the siding, back into the passing track. We next kicked the twelve stock cars back into the passing track and Mr. Hemphill went back with those on [fol. 25] the passing track. There was nobody on the fifteen moving grain cars when they were cut loose from the stock cars and speeded back on this elevator track. Nobody in control of them. They were not lighted in any way. There was no light on the west end of those fifteen grain cars that were moving west. There were no other lanterns visible to me as we kicked those cars except Mr. Hemphill's lantern, and it was purely by his lamp signals that I was working by, and I was unable to see Mr. Toops on account of the curve there and the cars pointing on this elevator track, wouldn't make it possible for me to see him if he was around the curve. It would make it impossible for me to see further than just the main track switch on account of that "L" and curve that is there. If he had been beyond that I couldn't have seen him from where I was working.

Mr. Hemphill's kick-in signal could not have been seen from the derail where Mr. Hemphill was standing. The signal couldn't have been seen from the derail where Mr. Toops' body was found. It couldn't have been seen from there to the cross-over switch where Mr. Hemphill was passing the signal from. There was no whistle signal given, and I don't believe the bell was rung. I wouldn't want to say for sure because the bell is something you can't very well hear if the cars are moving at the distance I was from the engine. It may have been ringing, but I don't remember if it was. The engine whistle wasn't blown at any time after we started switching in the yard until it was blown to call the agent after we found Mr. Toops' body. After Mr. Toops made the coupling of the five grain cars Toops and Hemphill came up toward the engine and we met there, and I read the switch list aloud. The instructions on the switch list said to get the fifteen empty grain cars behind the twelve stock cars off of the passing track and place them on the elevator track for loading.

The last that I saw of Mr. Toops he was around the depot [fol. 26] platform and it was at the time we were getting those twenty-seven cars while we were making the couplings on them, and at the time I walked up the line to the cross-over switch, I could see him around the depot. I noticed him a couple of times while the couplings were being made, and I noticed two lanterns down there. I wouldn't have known one from another any more than watching the lanterns and knowing who came out at the rear end of the cut. It was a dark night. I couldn't see any surrounding objects where Mr. Toops and Mr. Hemphill were with their lanterns. All that I had to go by was just the movement of the lanterns. I couldn't tell which was which, it was too dark. When I last saw Mr. Toops he was at the east end of the platform of the station. He was standing still and previous to that, a few minutes before, I saw him west of that, and I saw him move from there to the east of the station platform. I think he stopped in the neighborhood of the east end of the depot. That is the last place that I saw him until the time I saw his lantern lying on the ground and found his body under the tender of the engine.

When the stock cars were kicked in onto the passing track Mr. Hemphill went in with them. I then lined up the cross-over switches, that is on the main track, and walked to the inside cross-over switch and lined that over, and then walked to the east end of the fifteen grain cars that had gone in on this elevator track and gave the engineer a back-up signal, and made the coupling between the engine and the head car of the fifteen grain cars. The front end, or the head car of the fifteen grain cars, was standing about two car lengths west of the inside cross-over switch, when I made that coupling. By inside I mean the one that was between the stock tracks and the passing tracks. The switch west of the cross-over switch is about 60 or 70 feet west.

After I made the coupling I got on top of the head car and Mr. Hemphill was to the west giving the back-up signal. [fol. 27] I am sure he wasn't on the fifteenth car. I repeated the signal to the engineer and he started to back up. It looked to me as though Mr. Hemphill was going away from me walking westward on top of the cars, as though he were trying to get to the rear end of the fifteen car cut. Hemphill was on the top when I got to the top. I don't know at just what time he crossed over on account of the curve there, but he was on top at the time I got on top of the east car.

After I passed the signal the engineer started to back, and when we got to the point where we turned in off of the main track on the elevator track I saw Hemphill's lantern. I was standing on the second head car. I had walked from the head car to the second head car to get a better view of Mr. Hemphill, and it was better for the engineer to see me from the second car than from the head car, going around the curve. When I got back, where we were going off of the main line to the elevator track, I saw the lantern there and started yelling, and gave a violent stop signal, and the engineer came to a stop. I gave them an emergency stop signal. I saw the lantern lying in the thistles about three or four feet south of the south rail on the elevator track, and a few feet east of the derail, I will say three or four feet, and to the south of the south rail of the elevator track. I also saw the conductor's hat and lead pencil. The hat was a couple of feet from the lantern, and the pencil was

closer than that. The pencil wasn't more than a foot, and the hat possibly two feet from it, but they were right in front of the lantern so that the bulb of the lantern shone right down on them. The lantern was about three or four feet south of the south rail. I gave the signal because I knew that was no place for a lantern to be lying there on the ground, in a position like that, and because I had been trying to locate the two lanterns and I located the one on top, and the first I could locate the other was there on the [fol. 28] ground. That was the reason I gave the signal. When you see a lantern in that position it is an indication that something is seriously wrong, and a person would stop at once. That is the rule.

After I had given the emergency signal I got down off the car as quickly as I could and picked up Mr. Toop's lantern after I had marked the place where I had picked it up with my heel. I looked around the engine there and under the tank and saw his body, and saw his head on the outside of the rail, and his arm was cut off and lying a few feet west of his head and body. His arm was about three feet from the head. Both were on the south side of the rail. The body was right on top of the derail. His shoulders were right on top of the derail, his back down. He was lying at an angle with his feet to the east and the shoulders on top of the derail to the west, lying in an angling position in between the two rails. My lantern went out either when I was giving the stop signal or coming down the car, I don't know which. I was using an oil burning lantern at the time. I picked up Mr. Toop's lantern, which was an electric lantern with two bulbs. It was burning. If it hadn't been burning I never would have discovered him being there. (Witness identifies the lantern as being the lantern of Mr. Toops.) I yelled at the engineer and fireman. They were both on the engine and they both got onto the ground, and then Mr. Hemphill came a couple of minutes afterwards, after we stopped, so the whole train crew was there. Three wheels of the engine tender had passed over the body.

At the time that we coupled the engine to the fifteen grain cars they were two car lengths west of the inside cross-over switch, the east car was. To the best of my judgment the west end of those fifteen cars was about three

or four car lengths west of the derail, and that is before the fifteen cars were moved by the power of the engine. [fol. 29] The witness here identifies the rules of the A. T. & S. F. Ry. Co. and the plaintiff's attorney reads the following definitions:

"Station.—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated."

"Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations.

(Witness resumes:) There were no yard limit marks at that station.

Plaintiff here introduces the Book of Rules, calling special attention to Sections 102, 320, 473, 478 and 24.

Cross-examination:

I gave my evidence before the coroner's jury and signed it by the name of John McHenry. That was the name I was going under at the time. I signed a statement that was made out by Mr. Hemphill to Mr. Shull, the claim adjuster. I merely signed that statement as to the position of Mr. Hemphill. I wasn't vouching that the statement was absolutely correct. I didn't know about that. I am just here out of the hospital, and at that time I was in worse shape than I am just at the present time, as to my physical condition. I don't mean that my mind was impaired, but I was very nervous and I didn't look at things possibly in the right way. I was too sick to make out a statement and I told the claim adjuster to put a clause in the bottom of Mr. Hemphill's statement as to how I found Mr. Toop's body. About the first of this year or the last of last year, I gave my deposition in this case at Milwaukee. [fol. 30] I guess my mind was in about the same condition as it is now. I think that what I said at Milwaukee was a correct statement of what took place. Mr. Toops, the conductor, was in charge of the train. He had entire charge of the station and the switching operations. If a conductor

has other work in his line of duty, he does that, like writing up his bills or checking the cars that he is going to take with him on the train. He does that and leaves the rest of the crew to go ahead with the other work. If he tells me to do something as a brakeman, it is my duty to do it, and if he tells Hemphill to do something, it is Hemphill's duty to do that, and if he tells the engineer to do something, it is the engineer's duty to do it. The conductor has entire charge of the switching operations and the others simply work under him.

The first thing we did was to pull out the four empty cars that were intended for Feterita. They were the four front cars and moved east on the main line. We went to the elevator track and backed in on that track, about thirteen car lengths from the road crossing, I think. A car length is about forty-two feet, about one-eighth of a mile. That track is beyond the elevator switch. The elevator switch lays to the west, then we backed down the elevator track and picked up five cars, and attached these five cars just behind the four empties. I took the cars back in there and Mr. Hemphill cut across there and we got the nine cars together and Mr. Hemphill walked back over. I made the coupling on the head car. At that time Toops was coming up along the train as far as I know, from the caboose to the head end. I had been told by Mr. Hemphill when we left Willburton that on our arrival at Rolla to hold on to the four empty cars and pick up the five grain cars from the elevator track. Hemphill came over, I believe the five cars were all together. Mr. Hemphill had nothing to do with the making up of that train. After the grain cars were [fol. 31] attached to the empties we went east again and passed the main line switch. Then we backed down on the main line to the train and the conductor coupled those nine cars to the train. Then I detached the engine. After that I had the switch list and I read the switch list aloud with both Toops and Hemphill there. That was on the station platform. I saw Mr. Toops after that, that is I saw his lantern. I saw one lantern on the platform and one down along on the passing track where we were getting the twenty-seven cars out of there. Mr. Toops was on the platform the last time I saw him. His lantern looked as though it was in a setting position or held in his arm or somewhere

where it wasn't moving. A conductor will put his lantern on his arm if he is checking a train or anything, he puts it on his arm. It was standing still. I didn't see any movements. This platform is north and west of the derail. It must be about two hundred feet, maybe more, maybe less. It is south and east of the station. We had to put the stock cars back on the passing track where we got them, and the stock cars were in front of the grain cars. They were on the passing track but foul of the cross-over, so we couldn't get off the main line through the cross-over without going to the east end of the stock track. We had to bunch up the stock cars and push them back to the grain cars. The stock cars were all coupled together, but there was a little gap between them and the grain cars. There was one road crossing cut in the grain cars, otherwise they were coupled together. We picked them up and went east through the cross-over. As we shoved back there to make these couplings we got the cars and engine to clear the cross-over, so I could head through the cross-over, and we pulled them east then out onto the main line up over the cross-over switch and through the cross-over switch back, so we could kick the cars in towards the elevator track. I don't know just how far beyond the cross-over switch we went, I was [fol. 32] at another cut, but possibly a couple of car lengths, or three or four. We went far enough east so the whole twenty-seven cars had passed three or four car lengths over to clear the cross-over switch. That would put the engine about thirty car lengths east of the cross-over switch. I was on the ground on the south side about ten or twelve car lengths from the rear end. Mr. Hemphill was back there to throw the cross-over switch back after we got back over it. We kicked them toward the elevator track. The cars we were trying to kick were the fifteen grain cars which were on the west side of the cut. We were going to kick them toward the elevator track and did so. Then we kicked the stock cars back onto the passing track. That left the engine free of cars. I then lined up both switches, the cross-over switch, both the main track cross-over and the inside cross-over, and walked to the head of the 15 grain cars, just about two car lengths west of the inside cross-over switch, and the main track pointed toward the elevator track. It was then our intention to shove them back by

rolling them on the elevator track. Our instructions were to put them down there, spot some, and leave some up by the elevator and to shove some by, as the gravitation is east, and we were to shove some of the cars by the elevator and spot some by the elevator, and the rest of them would run down of their own accord as they needed them. It was while we were moving those fifteen cars intending to spot them by the elevator that I discovered Mr. Toops' lantern. At the time I was on the second head car. I had come off the east car, the head car, to the second head car, to be in a better position to be seen. I could pass the signals and see the signals from Mr. Hemphill better off of the second car than I could the head car, on account of the curve. From the time we coupled onto them and started shoving until we came to a complete stop, would be between 10 to 12 car lengths, that is the best of my judgment. The night [fol. 33] was dark. I could go out here in the yard and walk down the yard and come within a few feet telling how far I had walked. Any man that has been around cars could do that. It was not light enough to see how far the cars will go without walking back over the territory and having a judgment of how we had shoved the cars. I did that that same morning. I took no notes but I just satisfied myself as best I could as to how far it was from the derail, the best I could. We examined those fifteen cars that night. We walked back over them. The whole crew went back over them. I testified at Milwaukee that an examination of those cars showed blood on the wheels, on all but the last two cars. The thirteenth car was the last car that we found blood on. I found no blood on the car that was furtherest west. I found blood on all the other cars, on the wheels, the south wheels, little stains of it. There was no blood on the rails outside of right around the derail, that is all that I could see. Mr. Toops' body was lying on its back with his shoulders further west than the feet. The head was on the outside. Found nothing in the middle of the track. I never saw his book at any time. I didn't see the book. I wasn't there when they moved the body from under there, because I was so sick I couldn't hardly stand up. I went to the station and stayed there until after the body had been picked up. I was so nauseated by the sight that I simply had to quit. That night we caught

a train back to Elkhart. The cars we were placing on the elevator track were shoved back and left together on the elevator track. Our train was left at Rolla, put part of it in the shed and house track and filled up everything we could around there to get rid of the train and took the caboose and went right back to Elkhart. I stayed in Elkhart that day, then I threw up my hands and quit. After we had got rid of the stock cars and were spotting the grain cars, the engine was pushing them back, and there [fol. 34] was but one movement of the cars from the time we started to shove until we stopped, and I gave the wash-out signal. We were going about seven or eight miles an hour, I guess. We were going to shove those cars onto the elevator track about thirty-five car lengths. When we pulled out of the passing track with the twenty-seven grain cars, we took the fifteen grain cars towards the elevator track, and then after coupling the engine we shoved them on back. When I first saw the lantern I was just approaching it a little east of it, possibly within the two car lengths. When it stopped the engine was right on top of the body, that is the front trucks of it was on top of the derail.

Redirect examination:

The elevators were on south side of the elevator track. The most eastern elevator would be just a little west of the depot, the best I can remember. When we left the cars that night the grain cars were between the derail and the road. The couplings were all made and we just left them standing as they were. The track by the derail was just skeletonized. Skeletonized is where it isn't filled in between the ties; where it isn't filled in between and up even with the ties. There was very little ballast there. It didn't come over the top of the ties.

Recross-examination:

I am not saying that the track was wholly skeletonized. I say partly skeletonized. The ballast wasn't up even with the ties there in between the rails. There may have been a little bit of filling in there, but it was scant and hard to find.

(Witness examines defendant's Exhibit 5, attached to a deposition taken at Dodge City.)

That is a fair representation of the tracks. One can see up to the derail. (Witness also examines Exhibit 6.) This looks to me as though there was more of a growth of weeds around there than there is at this time. Outside of that I think the picture is fair. But I think there was a larger [fol. 35] growth of weeds there than what there is in the picture, but I might be mistaken about it. I mean that there seems to be more weeds there than is shown in the picture. Otherwise I think it is, to the best of my judgment, a fair picture. As to everything except the weeds, I think it is all right.

Defendant introduced in evidence Exhibits 5 and 6, to which there was no objection.

W. F. Hemphill testified (Tr. 55, et seq.): I live at Albuquerque, New Mexico, and am switchman for the A. T. & S. F. Railroad. I have been in the employ for about five years. In the month of August, 1926, I was working between Dodge City and Elkhart. Ran over that route about six months. I remember the occasion of Mr. Toops taking out the train from Dodge City in August, 1926. I had not known him before. We went out to Elkhart on August 11th. We left Elkhart the night of the 12th and reached Rolla close to 12:30 or 12:45. I was the rear brakeman on the train and my place would be in the way car. The position of the head brakeman would be with the engineer and fireman. Mr. Toops was with me in the way car that night. When we got into Rolla we stopped about thirty car lengths west of the depot. There were twenty-nine or thirty cars in the train, I don't remember the exact number. When we got out Mr. Toops went up one side of the train and I went up the other. It is customary to do that. The head end of the train was at the station. I don't remember whether the engine had been cut off then or not. It might have been on the train but possibly was coming back on the elevator tracks, I don't remember. Mr. McHenry got the switch list and I remember he read it over. I don't know whether it was before we picked up the cars or after. I think it was after we picked up the cars. That was about 12:30 or 12:45. The first service I performed that night I went across to the elevator where

[fol. 36] the five grain cars were. The elevator was west and south of the depot, and I assisted in picking up those grain cars. When we got the five cars together with the four cars, we coupled them together and then we went east to the east end of the elevator track, and shoved them back against the train on the main line. Mr. Toops made the coupling. After that I gave the signal to back up and then waited until the engine went by me and walked across to the passing track. That was before the coupling was made. I had seen Mr. Toops down there and I didn't go down at all on that side of the train. Then I walked across to the cars that were on the passing track. I was about twenty-two or twenty-three car lengths from the engine, possibly one hundred feet west from the depot. I made the coupling of those cars back there at the crossing, I mean where the road crosses the tracks, that is all the coupling I made. I think there were either five or six cars west of the crossing and the balance were east of it, about twenty-seven cars all together. I didn't get up on the cars after they were coupled. I rode on the side of the car on the safety appliance. I came back past the depot and saw Conductor Toops. He was standing at the east end of the depot. There was a railroad truck there and he had the bill book and lantern on the truck. It was at the east end of the depot. The next time I saw him he was lying under the tender of the engine. As I rode by him that was the last time I saw him on the platform. I could see the bill book and he had it in his hand. He was leaning over it with his elbows on the truck. When I saw his body by the derail he had nothing in his left hand. I did not help take him out. When we pulled this string of twenty-seven cars off of the passing track we pulled them through the cross-over switch to the main line. Fifteen of them were grain cars. I threw the switch and gave the kick signal to the en-[fol. 37] gineer and I saw McHenry get on the cars, and I figured he had time to lift the pin, and I gave the stop sign. He was slow getting on, he had his lantern, I suppose, in the wrong hand or something, and didn't get to the pin as soon as I thought he would, and he didn't cut them loose. When the slack run out of the cars I knew they weren't cut off and gave another signal so he could cut them off. It was the kick signal, back-up signal. McHenry pulled the pin and I gave the stop signal. The fifteen grain cars went to the

elevator track. The front end of those fifteen grain cars stopped about two or three car lengths from the cross-over switch of the main line. I do not know that there was anybody on those fifteen grain cars when they were separated from the stock cars. There was no light on the cars. There was no light on the west end of the west car. After that I threw the switch to line up with the passing track. I threw the cross-over switch. I gave the cut-off sign and the kick sign for the stock cars. I caught those cars and rode them into the passing track and tied them down. They were cut off in response to my cut-off signal. The engine remained on the main line when those cars were kicked. I can't give you a definite answer as to how far I rode the stock cars before I applied the brake. I was setting the brakes all the time. I moved from one car to another and I set two or three brakes. The stock cars possibly stopped just about even with the depot, probably about the west end of the depot. I was probably about the middle of them, about six cars. I got down off the car just as they stopped and I walked across to the elevator track and got on those box cars. I crossed at about even with the platform, just a little bit east of it. When I got across I got on top of the grain cars, I mean the fifteen cars that had been kicked in. I was possibly two or three car lengths from the derail. I did not see Conductor Toops nor his lantern. I had my lantern. Mine was an electric lantern. When I got on top [fol. 38] of those cars and looked around and seen that the engine hadn't coupled on to these cars, I started walking to the west end of them, walked possibly one or two car lengths, and I felt the engine couple on and I gave the back-up signal, to come west. I don't think the first signal was obeyed, I don't think anybody saw it. I didn't see any lantern but I just took a chance that the engineer would see it but apparently he didn't. Anyway he didn't move. There is quite a curve there. There was a bank there six or eight feet high between me and the engine, not as high as a box car. I don't think the first signal was observed. When I saw McHenry coming on top of the car I saw his lantern and gave the signal. I didn't pay any attention to what he but the cars commenced to move to the west so he undoubtedly saw the signal. I got hold of the brake staff with both hands and the slack ran out of the cars and it almost throwed me off the cars. I thought we went out

of sight and the engineer had stopped and before I looked up I gave another back-up signal, and when I looked up I seen a lantern right on top of the car give a violent stop sign and I knew there was something wrong. I figured McHenry was hurt and was getting off from on top of the car. The brake I think that I took hold of was on the last car near the west end. There were no lights in the yards. There were no switch lights on any of the engines. There were no yard limit signs around there. When McHenry was getting down off the top of the car I figured there was something wrong and I started to run up the east end of the car. I possibly ran over ten or twelve cars before I got off. I was within three car lengths of the engine, and I think McHenry was between me and the engine, and he hollered that we cut Conductor Toops' head off. I got down, I saw his hat lying beside, at one side of the track, three or four feet from the rail, and his head and his right arm. McHenry showed me where his lantern was laying; [fol. 39] he had his lantern in his hand and he showed me where it was laying close to his hat, about a foot. I didn't see the lantern when I got up on top of the cars. I stayed in the center of the cars. I then looked around there for Mr. Toops' body, and it was between the rails lying flat on his back, with his shoulders lodged against the derail, catacornered between the two rails. The feet were east of the shoulders. I saw the place possibly fifteen minutes after it was taken out. There was an indication that it might have been dragged possibly two feet, just a little gravel and stuff scuffed up there. It looked as though the body might have been turned over. I didn't see anything in his left hand. His train book was lying between the rails on the track. There were about thirty-four or thirty-five bills inside of the train book. The train book was not bloody. The first person to examine the body after it was found was a doctor at Elkhart, or at Rolla, he was the first one to touch his body. I think I picked up the train book, but I am not positive. They were possibly two or three feet away from his hand. I think they were on the east side. When I got on top of those fifteen cars there was nobody else on top so far as I saw. There wasn't any lantern there. If there had been a lantern up there I would have seen it unless the person had it behind him or hid in some way. You could see any one with a lighted lantern on top of any of

those fifteen cars. When I gave the signal for the kick-in and it was made, there was no signal that I know of given by the engine nor the bell, that I heard.

Cross-examination:

The last time I saw Mr. Toops before his death, he was standing at the east end of the platform station on the platform. I did not at that time have any talk with him. Before that I had talked with him. He was coupling up the air hose on these four or five cars that we picked up that were coupled onto the train, he was coupling the air hose [fol. 40] up on them and I walked down the south side of the passing track to this crossing to make that joint, and while Mr. McHenry was bringing the engine through the stock track I was standing at the crossing on the north side of the main line talking to Mr. Toops; he was on the south side of the main line, and he asked me if these fifteen cars were all in one cut and I told him they were and that I would kick them all into the elevator track. He said, "All right, I will look out for them." And that was the last, I think the last words that I heard him speak. That is the last thing I said to him. These cars were to be divided among the different elevators. From there I don't know where Mr. Toops went. I never saw him any more until we found him. The kick signal is almost the same as the back-up signal, only faster. A kick of cars is getting the cars rolling at such a speed that you can stop the engine and the cars will roll on under their own power and go where you want them. That is the usual and ordinary way of placing cars in the yard. When you are placing cars with a kick it is not the ordinary custom for anybody to be on those cars with a lantern to warn the other trainmen, unless you are kicking them over a public road crossing.

Q. When you are kicking them over a public road crossing, is the presence of some one on the train for the protection of the co-employes or for the protection of the public?

A. The public.

By Mr. Taylor: We move to strike out the answer.

By the Court: Yes; the answer is stricken out. The jury will not consider it. Exception allowed.

(Mr. Hemphill resumes:) We examined the wheels of the cars. It was dark and we had nothing but a lantern. We didn't crawl under and examine any of them very closely, [fol. 41] that is under the wheels, and if I remember right it was the twelfth car from the engine that we found blood on the wheels that night. I examined again in daylight and I think there was blood on the fourteenth car from the engine and none that I remember seeing on the fifteenth. There was nothing on the track to indicate how far, if at all, the body had been rolled or dragged. The gravel was a little scuffed and looked like it might have been turned over and dragged possibly two or three feet. I think Mr. Toops was right handed. This note book of his was lying to the east. His left hand was to the west and the book was to the east. The lantern at the spot where Mr. McHenry showed me his heel mark, was possibly three feet from the track. The side of the car would extend about eighteen or twenty inches from the rail. I do not know how long the lantern was lying there. It couldn't have been over fifteen minutes at the very outside. It couldn't have been over ten or fifteen minutes from the time I was talking to him until he was found under the car. I was on the north side of the car and the lantern was on the south side. That would be the reason I would not see it. I don't know of anybody being on the south side while we were standing there. The engineer had not been as far west as that.

Redirect examination:

There may have been a path down the main line on the south side but it was eight or ten car lengths from the end of the platform where I last saw Mr. Toops to where we found him dead on the tracks. I do not think that it was less than two hundred feet; it might have been, but I do not think so. I do not think it was contrary to the rules to run a string of cars, that is to kick a string of cars in at night without a lantern on the end of them.

Q. I will ask you what the rule books says about that.
[fol. 42] A. The rule book says that in shoving or making up cars, you don't have to have a man there. It may not express it in those words but that is what it means.
Q. I will ask you if it doesn't read as follows:

"When cars are pushed by an engine (except when shifting or making up trains in yards), a white light must be displayed on the front of the leading car by night."

A. That is it exactly.

Recross-examination:

This movement of a train was shifting and making up a train.

Redirect examination.

Rule 102 reads as follows:

"When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."

I gave my deposition at Dodge City in this case. I don't remember whether I testified then as to any conversation I had with Mr. Toops, I don't remember whether it was brought up or not. When I made out the statement to the claim adjuster, it was in there. I don't think that I testified to it in a deposition. I still am in the employ of the A. T. & S. F. Railroad Company.

F. R. HALL testified (Tr. p. 79, et seq.): I reside at Dodge City. I am a locomotive engineer. Have been for eight years. On August 13, 1926, I was operating an engine on the western division between Dodge City and Elkhart. At that time I had been running over that branch about a month and a half. I had been acquainted with Mr. Toops about fourteen years. That was Mr. Toops' first trip as conductor of that train that fall. On the return trip from Elkhart we arrived at Rolla on the morning of August 13th. I was in charge of the engine. Mr. Phillips was my fireman. [fol. 43] I went to supper with Mr. Toops the night before. The first thing Toops said was "Tomorrow is Friday the thirteenth, watch your step." We arrived at Rolla about 12:20 a. m., if I remember right. I remember pulling a string of cars out on the main line track at Rolla. I received a kick signal there with reference to the fifteen grain cars

on the rear of that string. I do not know positively who gave me the signal. I obeyed it. After we had kicked in the fifteen grain cars on the elevator track we kicked the stock cars onto the passing track. Then we coupled up to the fifteen grain cars again. The east end of those grain cars was about two car lengths from the cross-over switch connecting with the main line. I received a signal to back up after I had coupled onto the cars. I could not see a brakeman on the rear end of the cars or down near the middle of that string of fifteen cars. From the engine cab I could not see anyone standing on the ground. There was an obstruction there in a bank, probably five or six feet high. I didn't see any lantern thrown out of any kind, I couldn't have seen it.. It was a clear night, but dark. I knew Toops very well. His disposition was cheerful.

Cross-examination:

I could not see the movement of the cars. I could see the lantern. If I had had a lantern I could have seen the movement of the cars possibly a short distance. I suppose you could see with a lantern when you were coming to a track. I don't know, I didn't have any lantern down there. I don't really know how far these electric lanterns throw, I don't use one of them. Engineers don't use lanterns. I suppose you could see a short distance, but I don't know exactly how far you could see. It is usual for the engineer to give a signal when he is starting up a train on a kick signal. It is the general practice of an engineer when he gets his signals from a brakeman or switchman, he goes ahead and makes the kick.

[fol. 44] I have known Mr. Toops for a long time. I knew him when he worked on that division before in the summer of 1913. I worked with him. There had been no particular change in the location of the track, or the way in which the tracks were built, or the switches, in that time, none that I know of.

Redirect examination:

There was a curve there that made it impossible to see around to the back end of the fifteen cars.

Q. I will ask you if it isn't one of the rules of the company in a case of that kind, that an engineer will, in round-

ing all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14 (1). That is on page 15 of this book. You knew that to be the rule, didn't you?

A. Yes, sir.

Q. And the whistle is prescribed to be two long and two short blasts?

A. Yes, sir.

Recross examination:

That rule refers to the operation on the road. In this case I didn't know where the cars were going to, it was dark. There was a curve there but I didn't know that the cars were going around this curve.

The deposition of WILLIAM J. PHILLIPS was then read in evidence (Tr. p. 89 et seq.)

My name is William J. Phillips. I reside in Pueblo, Colorado. My occupation is that of a locomotive fireman. In May, 1926, I was working for the C. & W. Railroad running a switch engine at the steel works, but in August I was working on the Santa Fe out of Dodge City on the Elkhart branch. On the night of August 12th we were coming east out of Elkhart. M. G. Toops was conductor. The head brakeman was McHenry and the rear brakeman was [fol. 45] Hemphill. Fred Hall was engineer and I was fireman. I had worked on several branches of the Santa Fe. If I remember right that was either my first or second trip on this Elkhart branch. It was the first trip for the conductor. I would say there were twenty-five or thirty cars on the train. We arrived at Rolla probably about 12:30 or 12:45. The train stopped west of the station. The engine was even with the depot or not more than a car length east of the depot. I think we picked up the switch list, there is always one out there. We had some switching to do. We cut the engine off, went down there in on the elevator track, got four or five cars, put them on the main line; went to the east end of the passing track. There was stock cars on the east end of the passing track. We had run back on the main line and put some more cars onto the train. We went

to the east end of this passing track, there was stock or grain cars there. There were a few openings between there and we had to back them up and couple them. Ten or twelve grain cars had to come out and go on the elevator track; we pulled the cars out and kicked whatever grain cars had to go back on the elevator track; we stopped and backed these stock cars onto the passing track and left them. We backed them over the cross-over switch. We come out of there and got these cars, grain cars. After we kicked in those stock cars our engine was just even with the cross-over switch. The head brakeman lined up the main line switch. When we lined the main line switch, the engine did not go over one or two car lengths until it coupled onto the cars. The east end of the fifteen grain cars on the main line was just in the clear off of the cross-over switch where it connects with the main line. I could not see the end of the train when I was seated in the engine. I was on the left hand side. I remember when the train started back. I saw the head brakeman give a back-up sign, and then when we got on the curve I saw [fol. 46] this wash-out sign and hollered to the engineer. That is a violent stop signal. The engineer stopped at once, the train did not go over half a car length. I can not remember whether there were any signals given or not before the engineer started backing. The bell was ringing at the crossing. After we got to the switch, I don't remember whether he shut the bell off or not, it was an air bell. I don't remember whether there was any whistle blown when I started backing. The bell was rung by the engine. I had no cause to ring it by the rope myself. I do not remember that there was any bell rung or whistle sounded. When the train stopped I heard the brakeman holler, "We have killed the conductor." I went on the engineer's side and the tender was over his body. I noticed his head was lying to the south of the track. His lantern was burning. He had two globes on it, the biggest was burning. That is the way McHenry found him. His hat was to the side. I remember the head, the hat and the lantern. There was an arm, but it was pretty well mangled up. When we found his body there we got down and saw he was dead, so the engineer got back on the engine and whistled the operator out. While he was doing that one of the brakemen went to

the operator's house, got the operator out; he opened the depot, got the dispatcher at Dodge City and said we had killed Conductor Toops and he was under the engine. The dispatcher wired to take the body out. Hall and I said there was a coroner at Rolla; they got the coroner; when they got him he pronounced him dead and took the body out. We got orders to put the train away. We put the body in the way car and went to Elkhart. We got orders to put the train away. We put the train on the passing and part of it on the house track; it was a job to put it all away. There were no switch lights at Rolla. I do not remember of ever seeing them there. There are one or two at Elkhart. [fol. 47] We found Toops' body about 1:05 or 1:10 in the morning. It was a clear, dark night, awfully quiet. When the trainmen had their lanterns you could see them, but in the dark it was pretty dark. When I saw the violent stop signal I could see a lantern at the far end of the string of cars. I figured it was the rear brakeman. That was at the west end of the cars. I did not pay any attention to him until I got on the curve and saw the brakeman give the violent stop signal. I could not say who was on the back of that string of cars, all I could tell was McHenry. He was on the first car next to the engine—on the very west, and I could not tell—all I could tell was a light on the car. I did not see any of the crew until we got on the cars and started backing. It looked to me as though Hemphill's position was on the fifteen cars. When I saw that light on the back car we had only gone a couple of car lengths. I did not see where Conductor Toops was while we were doing the switch. When the cars started down the elevator track there was quite a curve. You could not see from my side, the south side of the train. You could see the north side of the train on the west end when they started to back, up to where they took the curve. I can't say whether there is a rule providing for placing a light on the rear end of a string of cars where there are no switch lights.

Cross-examination:

It is not the habit to whistle while switching in the yards. So far as the bell is concerned we ring it at the crossing, that is all I remember. It might have been ringing and it might not. There are some switching lights at Satanta, and

some at Elkhart. These are the only ones on the Elkhart branch. We were pushing the fifteen cars to the west. When we found out about Mr. Toops being killed we made an examination of the fifteen cars to see whether there were any marks to indicate what car had struck him. It seemed to have been the second car from the went end. There was [fol. 48] blood on that car. We looked at the other cars to see whether there was blood on them. It was on the trucks of the second car, the first pair of trucks on the second car, the front trucks as we were going. We made an examination of the track and it did not look as though he had been dragged. It seemed to me he was twisted about, lying on his belly. On the coroner's inquest, I was asked: "Do you know how he met his death?" and I answered "No." That is true. There was nobody about except the train crew. We could find no markings on the rear car to indicate that Toops was struck by the rear car.

Redirect examination:

I don't recollect whether we stopped at Rolla doing down to Elkhart or not. The examination we made was that night. I made it in person with a lantern and torch. I could have seen blood spots. I never got clear under the car for the purpose of examining it. There was no blood on the wheels. I examined the track east of the derail for several feet. There was no ballast between the tracks outside of dirt ballast. The conductor's lantern was lying about three or four feet south of the track. The hat was about the same distance. I did not notice whether the conductor had any papers in his hand. I do not know whether there was any considerable clearance between the top of those ties and brake beams. There is always some clearance. I do not know how many inches it is. Toops had an electric lantern and a good one. If Toops had been on top of the train I believe his lantern would have been visible to the other trainmen on top of the cars. If he had been on either side of the track it would have been. There would be nothing to prevent the trainmn on top of the cars from seeing him, if they had been looking.

[fol. 49] Frank Algeo testified (Tr. p. 111, et seq.): I am a railroad conductor working for the Santa Fe. The

rate of pay is $6.16 a hundred miles with a guaranteed mileage of 3,800. The wages would figure around $230 to $240.

Cross-examination:

His pay check would depend on how much he had worked. I have no idea how much he earned, whether he worked all the time or not. I don't know what he had done for two years preceding his death.

JUDD BENSON testified (Tr. 114 et seq.): I am a life insurance agent for the Equitable Life of New York. (It was admitted that the Mortality Tables would show that at the age of 37 years Mr. Toops would have an expectancy of 30.4 years, and Mrs. Toops at the age of 36 would have an expectancy of 31.1 years.) Mr. Benson continues: My company has figured out by tables the amount which invested now would return a monthly stipend for any certain given number of years. I have such table I have it for thirty years. That would return a monthly sum of money.

Q. Assuming, for the purpose of this question, that the evidence shows that Mr. Toops contributed to Mrs. Toops and her daughter the sum of $125.00 per month; that her age at the time of his death was thirty-six years; that she had a life expectancy of thirty-one years; that his age was thirty-seven at the time of his death, and that his expectancy was thirty and four-tenths years; that he was strong, able-bodied, and in good health; that the evidence shows his disposition to contribute toward his family was good; what amount of money, if paid now, would make a return to Mrs. Toops and her daughter of $125.00 per month for the period of her expectancy, which in this case *if* thirty and one-tenth years?

(Defendant objects to the question as to what amount [fol. 50] of money would be required now to pay such a sum. It would depend upon the worth of money in this community and it is not what a man could buy an annuity for from an eastern life insurance company.)

By the Court: Overruled; exception allowed.

To yield $125.00 a month, according to the life annuity table, for a male at that age, is $26,489.00, $125.00 a month. That is based upon a three and one-half per cent rate of interest.

Cross-examination:

I am not an authority. I am not pretending to figure this out myself. I simply use the annuity table which is on a basis of three and one-half per cent. I am not able to say what it would cost to buy an annuity of the same amount on a basis if money was worth six per cent, I haven't those figures, or five per cent, or four per cent; three and one-half per cent is the only basis that my table shows. That is the rate fixed by my company.

Redirect examination:

It would probobly take a day and a half to figure out the rate at six per cent.

Mrs. Mabel G. Toops, recalled, testified (Tr. p. 121 et seq.): I had not seen Mr. Toops for about three or four weeks before his death. I think it was about four weeks. He was in perfect health so far as I know. He was about five feet eleven and one-half, weighed about 155 or 160. He contributed I should say $133 to $140 per month. He received $115 to $125 every two weeks.

Cross-examination:

I never figured out what he received for twelve months period prior to his death. He had been at work all the time for several years. I never figured out how much he made a year. What he paid included the expense of a house, we were paying for our home. We were paying $40 per month on it. Our home is at Kansas City, Missouri.

[fol. 51] James N. Farley testified (Tr. p. 127 et seq.): (Witness identifies Exhibits 7 and 8, certain photographs taken in the summer of 1927.)

I. R. Bryan testified (Tr. p. 136 et seq.): I live in Texas County, Oklahoma, about two miles from the Kansas line. On the morning of August 13th I was at Rolla with a load of wheat. I went over and looked over the track. I had known Mr Toops about twenty years before his death, and was intimately acquainted with him. I noticed the condition of the track by the derail with reference to whether it was ballasted or not. There is no ballast in there. The ties were just laid on the ground, just like laying brick on top, some places there was a little, maybe a gallon of dirt between the ties, and some places there wasn't any; just steel laid on top of them, and spiked down. There were a few thistles growing around there.

Cross-examination:

I am a farmer. I said there was only about a gallon of dirt between the ties just down the center of the ties. It was that way right along in lots of places, and of course in some places there might have been more. By the derail there were some places that were ballasted some. (Witness examines defendant's Exhibit 6, and said: "Well, it looks like the tracks there. I don't see any dirt at all between those ties in the picture. We were trying in our own mind to figure out if there was anything that caused the accident, anything like that, just walked down the tracks. There may have been other things than the lack of dirt. He could have caught his foot on a spike. There is a spike sticking in there just close to where he laid on the inside of the rail. It isn't drove down, it wasn't a couple of weeks ago. It is right close to where he was lying between the rails. I didn't see anything to indicate that he fell on a spike, but he was there and the spike was there.

[fol. 52] Company Rules

Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need.

Sec. 320. Trainmen and yardmen, before switching or moving cars at stations, must ascertain that there are no

persons or property on or about the same that might be injured or damaged by so doing.

Sec. 473. They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14.

Sec. 478. They will use great care in backing up to take a train, or backing into a siding to take or leave cars, and will approach so slowly that couplings can be made without injury to persons or property.

Sec. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night.

The plat agreed upon at the trial, and the photographs identified by the witnesses for the plaintiff, are filed with the Clerk of the Supreme Court, and reference is hereby made to the same as though formally set out in this abstract.

DEMURRER TO EVIDENCE

This concluded the evidence for the plaintiff to which evidence the defendant demurred for the reason that said evidence did not make out a cause of action against the [fol. 53] defendant. After argument said demurrer was overruled by the court (Tr. 135).

Thereupon, the defendant introduced the following evidence:

DEFENDANT'S EVIDENCE

TOM BROWN testified (Tr. 136, et seq.): I live at Williamsburg, Kansas. In the summer of 1926 I lived at Rolla and was in charge of an elevator there. Rolla is a place of a couple hundred population. I remember the night that Mr. Toops was killed. I was there ten minutes after he was killed. There was no indication that his body had been moved by the time I got there. The engine was still there. After I got there they would not move the engine

until we got a doctor or a coroner. Mr. Toops' body was lying between the rails with his shoulder lying on the derail. The derail was open and the shoulder lying on top of the derail. The head was lying just south of the south rail entirely severed, and one arm was entirely severed. He was lying on his back, breast up. His feet were further east than his shoulders. We aximened the trucks of the freight cars that night and then made another examination the next morning. We found no marks of blood on the first car. The first marks of blood we found on them were on the west end, west wheel, on the south side of the second car. Following these cars up to the engine, we found blood on every wheel, blood and flesh on every wheel up to the tender, up to and including the tender.

Cross-examination:

I crawled under the cars the next day, just under the first two. I made this examination at the request of Mr. Shull, the claim agent of the Santa Fe, and Doc Ellis. It was made in the morning. Dr. Ellis was the doctor that was called before we moved the body, before anybody would touch it. The doctor requested that we look the [fol. 54] ground over thoroughly because we would all be called, and that we would more than likely be called on the coroner's jury. I could not say whether Dr. Ellis is a Company physician.

Redirect examination:

I do not know whether he was the coroner, but he is a physician who lived at Rolla at that time. We crawled under the two west cars. There was nothing on the brake beams of the second car showing anything where he had been rolled. We examined the cars and examined the brake beam, of only the first two cars. I don't know whether there was anything on the brake beams on the third car or not, I didn't look. I do not know whether anybody was under there between the time we looked at them with the flash light at the time of the accident and when we crawled under there next day.

J. R. McGovern testified (Tr. p. 142 et seq.): I have been working for the Santa Fe Railroad for thirteen years as

a roadmaster. I am familiar with the situation on the Dodge City-Elkhart road. On that road the track is a dirt track, dirt ballast. I know what a skeletonized track is. A skeletonized track is rails and ties only; rails spiked to the ties. We have no skeletonized track on the Dodge City-Elkhart branch, and never have had except where we are working. After we have completed the track we have no skeleton track. A dirt track, after it is surfaced, the center of the track is filled in with dirt; between stations we generally fill it in high, as high as the top of the rail, to shed water. In yards and station grounds the dirt is filled in level with the top of the tie, and the ends of the ties are left bare, so as to shed water. That is the kind of track we had in the station yards at Elkhart, or at Rolla. There is no signal lighting system in the stations on the Elkhart branch. I was down at Rolla in August, [fol. 55] 1926. The conditions of the tracks at that time was known to me. The rough weeds were cut away from the track; the center of the track was filled in between the ties.

L. A. Arthur testified (Tr. p. 146 et seq.): I live at Dodge City. I am a brakeman for the Santa Fe and have been a conductor on the extra gang. I have been in the employ of the Santa Fe for fifteen years. I worked on the Dodge City-Elkhart branch in 1914. I worked from the 5th of August, 1914, to the 5th of May, 1915, and Mr. Toops was working at that time. We did work all along at the stations along that branch, including the station at Rolla, and Mr. Toops was engaged in the same work. The only change that I can think of in the condition of the yards at Rolla is that they have connected up the west end of the elevator track to the main line, that used to be a spur. There were no switch lights there when we were working, and there have been none installed since that year. When we were engaged in switching in the yards it is not the practice to have a man on the rear end of the train, or a string of cars that you are backing, to warn other trainmen, and at night it is not the practice to have a man at the rear end of the string of cars with a lantern to warn other trainmen, unless there

is a public crossing. The track at Rolla is just the usual house and elevator track. A skeleton track is one that has no dirt in it or about it. The track at Rolla is what I would call center fill. The ends of the ties were exposed to drain the water out from the center of the track.

Cross-examination:

I have had no conference with the attorneys about my tstimony in this case. I don't know why I was brought down as a witness, I was sixty miles from the accident. I have been brakeman for fifteen years. I know the difference between a yard and a station as defined by the [fol. 56] train rules. We apply "yard" to any place where you switch or make up trains. A station is where you receive and discharge passengers. A yard is defined by yard limits. We apply the rules that we have in actual service. I do not know of any yard limits at this station, and I haven't been out there for some time. It was in 1914 and 1915 that he was my partner on the Elkhart branch. I have worked at Rolla since then. I don't know that Toops has. He relieved me as conductor on that branch. So far as I know that was the only trip he made at that time.

J. B. Robinson testified (Tr. p. 151 et seq.): I am a railroad conductor, working on the Elkhart line. I have been there continuously since 1915. I knew Conductor Toops. When I first knew him he was a brakeman. He was working with me in 1915. He was on the run when I went out there as brakeman with Mr. Arthur. He was transferred some time in the fall of 1915. I know the condition of the track at the station of Rolla, and have known them practically ever since 1915. My interpretation of a skeleton track is a track where the dirt has been dug out from the ties for the purpose of raising the track, or laying new track, where they spur out bunk cars or material cars, where they lay track that is on top of the ground with spikes and rails and ties. At Rolla there is the usual house track and the elevator track. I would call it center filled or dirt filled, like the dirt track that they have on that line all the way through. It is not the usual practice

in switching cars for anyone to ride the cars unless it is necessary to stop them short for an obstruction.

Cross-examination:

There is quite a curve at Rolla and when we are driving a train into the elevator track from the main line track east of that, driving it into the west, it is impossible for the engineer or the head brakeman or the brakeman on the north side of the car to see what is going on at the end of [fol. 57] the train. A fireman can take a signal from the north side of the main line. If there was any employe of the Santa Fe Railroad Company that had any idea that there was anyone in danger, they would stop immediately and not back in any place. It is the custom that is observed by the Santa Fe to kick cars without having anybody in control of the cars, where they roll of their own gravity. One conductor might handle his work one way and another another way. I handle cars the way I have told you. In switching movements we do not put a light on the end at night and never have unless I was riding back to make a coupling and going across a crossing.

Q. You don't try to protect anybody?

(Defendant objects.)

By the Court: Overruled; exception allowed.

I have been running a train for twenty-two years and I have never had anyone hurt, not even a finger mashed on either a brakeman or myself. I told you that under certain conditions I am always on the rear end of the train if it is required, but in switching movements, and that is what I understood you were talking about.

This completed the defendant's evidence.

PLAINTIFF'S EVIDENCE IN REBUTTAL

In rebuttal the plaintiff introduced the following evidence:

Dr. H. J. DUVALL testified (Tr. p. 160): I am a practicing physician. Have been for thirty-one years. In a crushing

injury where a railroad car wheel or railroad engine mashes off a member, it mashes up the tissues so bad, including the blood vessels, that there isn't any bleeding immediately following it, like there would be if it was cut off with a sharp instrument.

And this was all the evidence introduced by either plaintiff or defendant.

[fol. 58] MOTION FOR DIRECTED VERDICT

The defendant moved the court to direct the jury to bring in a verdict for the defendant for the reason that the evidence did not warrant a judgment for the plaintiff, which motion was by the court overruled.

After the introduction of all the evidence, the Court gave the following instructions:

INSTRUCTIONS OF THE COURT

1

GENTLEMEN OF THE JURY: This is an action brought by Mrs. Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased, as plaintiff, against The Atchison, Topeka & Santa Fe Railway Company, as defendant, wherein the plaintiff seeks to recover damages for the death of her husband, M. G. Toops, for the alleged negligent acts of the defendant causing his death on the 13th day of August, 1927, at about one o'clock a. m., at Rolla, Kansas.

Plaintiff further alleges that for approximately eleven (11) years prior to the said 13th day of August, 1926, the said M. G. Toops, deceased, was in the service of the defendant, first as brakeman and afterwards as a conductor; that the said M. G. Toops as such conductor on the evening of August 12, 1926, was in charge of a freight train made up of and containing many cars of freight for transportation from Elkhart, Kansas, and other stations on said line to Dodge City, Kansas, and to points outside of

the state of Kansas; that the said freight train arrived at Rolla, a station on defendant's line situated in Morton County, Kansas, northeast of Elkhart, Kansas, at about 12:15 a. m. on the morning of August 13, 1926; that said [fol. 59] conductor M. G. Toops was in full charge of said train and had received orders to take up five (5) cars of grain, four (4) of which were billed to Kansas City in the State of Missouri and were therefore interstate shipments; that these cars were standing on what is known as the elevator track in the yards at Rolla, Kansas; that the said Conductor Toops and the train crew switched five (5) loaded grain cars from said elevator track to the main line of said railroad and placed same into said interstate train for transportation to points in other states; that the said M. G. Toops had further orders to set in on said elevator track for loading with grain for interstate shipment fifteen (15) grain cars which were standing upon what was known as the passing track, the norther-most track in said yards at Rolla, Kansas, and just west of approximately fifteen (15) stock cars also standing upon said passing track; that they caused the engine on said train to back up on said passing track and couple with said stock cars, back said stock cars to a coupling with said grain cars, then pulled said stock and grain cars out on to the main line track, and lined the switches up to divert the cars to the elevator track. That while the engine and the twelve stock cars and the fifteen grain cars were on the main line track and the switches were thus lined to lead onto the elevator track, the rear brakeman, Hemphil, being at that time on the south side of the main line track and east of the cross-over switch, gave to the engineer a kick-in signal; that said kick-in signal was negligently, carelessly and recklessly giden in that at the time it was given, Hemphill did not know the whereabouts of Conductor Toops, did not look to see where he was, and that if he had looked he would have seen Conductor Toops and could have given him a signal or warning that the kick-in was about to be made; that without ascertaining the whereabouts of Toops, Hemphill gave to the engineer the kick-in signal and the engineer in obedience thereto [fol. 60] started to propel his engine backwards with the intention of shoving the fifteen grain cars on down the

main line track and on to the elevator track; that Hemphill remained on the ground at the cross-over switch when the cut or kick-in should have been made and thereby divert the twelve stock cars back over on to the passing track; that the head brakeman, Nolan, during this time was on the south side of the track and four or five car lengths east of the cross-over switch at the passing track, and his duties, after the kick-in signal was given, were to make the cut between the twelve stock cars and the fifteen grain cars and allow the grain cars to be kicked in onto the elevator track as aforesaid. That the track at this point and throughout the entire length of all of the tracks in Rolla, Kansas, is very dangerous in construction; that the same was negligently and carelessly constructed by the defendant company, its officers, servants, agents and employes in that it is skeletonized, that the surface of the ground next to the tracks is full of holes and pitfalls and had been allowed to grow up with weeds, and that the same was extremely dangerous and insecure to the workmen trying to operate trains of the defendant. That because of this dangerous condition of the track and its environs, the head brakeman, Nolan, was unable to get on the train being backed as aforesaid in time to make the cut before the slack of the cars had run out; that he was therefore unable to make the cut and separate the fifteen box cars from the twelve stock cars. It thereby became necessary for Hemphill to give the second kick-in signal, which he did, and the engineer in response thereto gave the cars a second kick; that at this time the entire train was moving at a speed of ten miles per hour. In response to the second kick-in signal Brakeman Nolan was able to make the cut and the fifteen grain cars were separated from the engine and the twelve stock cars, and were kicked down the main line and in onto the elevator track.

[fol. 61] Plaintiff alleges that the operation of said train as above described was a reckless, careless and negligent manner of operating said train on the part of the defendant, its officers, servants, agents and employes, in this, to-wit:

That at no time from the time the first kick-in signal was given by Brakeman Hemphill, was anyone on these fifteen grain cars, until such time as shall hereinafter be set forth.

That at no time during the operation of the train just described was Brakeman Hemphill or Brakeman Nolan in possession of knowledge of the whereabouts of Conductor Toops, although in the exercise of ordinary care they could have known of his whereabouts; that at no time was any signal given by the engine or engine crew to Conductor Toops of their intention to kick in said fifteen grain cars; that no whistle was blown; that no bell was rung; that there was no light on the west end of said fifteen grain cars; that no brakeman or flagman was on the west end of said moving cars to give warning of the approach of the same onto and westward down said elevator tracks, that the tracks at Rolla, Kansas, at the point where the elevator track connects onto the main line track, make a very decided curve to the south; that there is a high bank at this point on the south side of the track and that the view from the derail on the elevator track to the cross-over switch to the passing track is cut off; that the hill on the south side is eight or ten feet high; that the track at this point was skeletonized and was in a very dangerous condition as has been heretofore described; that the published rules of the defendant company provide that when cars are being pushed by an engine as hereinbefore described, a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need except when shifting or making up trains in yards. And the plaintiff alleges that there are no yards at Rolla, Kansas; that there are no yard limit boards in or near [fol. 62] Rolla, Kansas; that there was no switch lights and no one was on duty at night to assist in making switches or handling trains through said station; that all of these facts were well known to the members of the crew operating the train at the time of the death of Conductor Toops.

Plaintiff alleges that Conductor Toops after having coupled the air upon the five grain cars which had been put into the interstate train on the main track, walked over to the east end of the depot and to a truck which was standing there, where he remained for a few minutes going through his order sheet; that as soon as he had completed that work, he proceeded east approximately 325 feet along the main line track and to a point north of the derail on the elevator track; that he was the conductor and in charge of said

train; that as such conductor it was his duty to assist in spotting cars and switching the train; that his proper position was on the right side or the engineer's side of said train, which in this case was the south side; that in order to reach the south side of the train it was necessary for him to go south and cross the elevator track; that Conductor Toops carefully, cautiously and while in the line of his duty, proceeded to cross said elevator track at a point three or four feet east of the derail on said track with the intention of placing himself in a position to assist at setting the cars to the elevators thereon; and that he was in the exercise of his duty in proceeding as above described; that the elevator track at this point, as has been heretofore described, was skeletonized and negligently constructed and in a dangerous condition; that the only light Conductor Toops had was the electric lantern which he carried in his hand; that it was necessary for him to carefully watch his footsteps; that just as he stepped on said elevator track, he was without warning struck by the west end of the fifteen moving grain [fol. 63] cars which had been negligently, carelessly and recklessly kicked in onto the elevator track by the engine crew in the manner hereinbefore described.

Plaintiff further alleges that said elevator track was negligently constructed and maintained by said defendant, its officers, agents, servants and employes in this, to-wit:

That at the place where Conductor Toops was killed on said elevator track, it was what is known as a skeleton track; that is, the railroad ties of the approximate dimensions of 6 inches thick, 8 inches wide and 8 feet long were laid on top of the ground, and the rails being approximately 4¾ to 5¼ inches high, were placed on top of the tiles, the distance between the rails being 56 inches; that the ties were placed on the ground 8 to 10 inches apart. That no earth or ballast of any kind was placed between or over the ties, and that this construction made said tracks unsafe for trainmen, especially at night in said unlighted yards; and that because of the space between the rails and the ties being vacant and unballasted, they were a trap and a snare for trainmen passing from one side of the track to the other; all of which was unknown to the said M. G. Toops, deceased.

And plaintiff alleges that said negligent and dangerous construction of said track as above described was one of the contributing causes of the death of the said Conductor Toops, and that it was well known to the defendant, its officers, agents, servants and employes that said track was of the said skeleton construction, and was dangerous and insecure and was a snare and a trap to those crossing said track and more especially to those crossing said track in the night time.

Plaintiff further alleges that at all the times hereinbefore mentioned, the said Conductor Toops at said Rolla, Kansas, was carrying an electric lantern which gave forth a bright light, and that said lantern was plainly visible to his fellow [fol. 64] servants except when said Conductor Toops passed behind the west end of said string of box cars; at which time his lantern was burning brightly; that it was the duty of the trainmen operating said train to observe the whereabouts of their fellow workmen, which at night are indicated only by their lanterns; and that it was the duty of the fellow servants to give signals to move said train only when the whereabouts of their fellow workmen were indicated by their lanterns; that the defendant, its officers, agents, servants and employes were guilty of negligence in this, to-wit:

That when the engine crew received the signal from the head brakeman who had given it without knowledge of the whereabouts of Conductor Toops, to kick in said string of grain cars for spotting at the elevators on the elevator track, the crew failed to ring the engine bell and failed to give the usual back-up or kick-in signal by whistle, and kicked said cars in onto the elevator track without giving any warning whatever to Conductor Toops that said train was about to be kicked westward; and that notwithstanding the fact that the night was very dark and that there were no lights in or near the tracks at Rolla, Kansas, to light up said elevator track, they kicked the cars as aforesaid and left them to roll in onto the elevator track of their own momentum with nobody on said cars or in charge thereof to give warning, and no lights of any kind or nature on or near them, and no warning of any kind or nature whatever of their approach.

Plaintiff alleges that as Conductor Toops in the line of his duty started to cross the elevator track as hereinbefore

described, he was struck by the kicked-in cars as aforesaid, kicked in and operated by the defendant, its agents, officers, servants and employes, in the negligent manner hereinbefore described, and was knocked to the ground between the rails in the manner hereinbefore described at a point about three or four feet east of the derail on said elevator [fol. 65] track; that his body was dragged along the ground between the tracks until his shoulders came to rest against the derail; that his head and right arm had fallen in such manner that they lay across the south rail of the elevator track and were severed from his body by the wheels of the rear car of said kicked-in cars; that when struck he threw his lantern to the south side of the track as a signal to the engine crew and brakeman to stop said cars; that there was no brakeman on said cars and the engine was not attached thereto and his signal was unobserved and met with no response; that his lantern lodged in the weeds and grass two or three feet from the rail; that he thereby met his death, and the sole and only causes therefor were the negligent, careless and reckless acts of the defendant, its officers, agents, servants and employes in constructing the track at Rolla, Kansas, and allowing it to be and remain in the condition it was in at the time and place hereinbefore mentioned and described.

Plaintiff alleges that at the time Conductor Toops was struck by the kicked-in cars, they were proceeding quietly and not at a high rate of speed but at a rate of speed sufficient to carry them two or three car lengths beyond the place where Conductor Toops was struck and killed; that the enginemen after having kicked in the cars as hereinbefore described threw the crossover switch leading from the main line to the passing track and set the twelve stock cars back on the passing track, then took the engine back onto the main line track and proceeded to back into the fifteen grain cars on the elevator track for the purpose of setting them to the elevators; that Rear Brakeman Hemphill rode the said twelve stock cars over to the passing track and set the brakes on them; that he then walked from the passing track over to the elevator track and climbed upon the fifteen grain cars at a point four or five car lengths from the place where Conductor Toops was lying dead; that he climbed up [fol. 66] on top of said cars and gave the back-up signal to

Head Brakeman Nolan, and Nolan in turn repeated it to the engineer, and the train was pushed backwards; that after giving the back-up signal Hemphill proceeded to walk in a westerly direction on top of the cars and towards the rear end of them; that Nolan walked to the second car from the engine and to the south side thereof in order to be in a position to see around the curve on the elevator track and better observe Hemphill and his signals; that just as the car upon which Nolan was standing was passing the derail, Brakeman Nolan saw the lighted lantern of Conductor Toops lying in the weeds, gave a violent signal to stop, and the engineer stopped the train as soon as he could, but not until after the train had proceeded westwards until the tender of the engine was over the body of Conductor Toops.

Plaintiff further alleges that by reason of the negligence of said defendant, its officers, agents, servants and employes as hereinbefore alleged, said Conductor Toops met his death in the manner and form set forth and to the plaintiff's damage as hereinafter stated.

Plaintiff alleges that the said Conductor Toops was 37 years of age at the time of his death; that he was a healthy, cheerful, active, able-bodied man, and as a conductor was earning approximately the sum of Two Hundred ($200.00) Dollars per month; that his expectancy of life was approximately 30.35 years, according to the American Experience Table of Mortality; that at the time of his death, his widow, Mabel G. Toops, was of the age of 36 years and had an expectancy of life of approximately 31 years; that the said Marthelle G. Toops, his minor daughter, is of the age of 16 years; and that said widow and daughter were his sole and only heirs; that he died intestate; that said widow and daughter were dependent upon him for their support and maintenance; that they have no income, or property of their own from which they could derive support or income; that [fol. 67] by the untimely death of said M. G. Toops, occasioned by the negligence of said defendant, its officers, agents, servants and employes, in the manner and form hereinbefore alleged, plaintiff's beneficiaries were and are damaged in the sum of Thirty-six Thousand Dollars ($36,000.00), for which sum plaintiff prays judgment.

The defendant answers, denying each and every material allegation and claim made by plaintiff, and admits that it

is a corporation engaged in interstate commerce, and that M. G. Toops, deceased, was a conductor in the employ of the defendant and was killed on the date and at the station alleged while engaged as a conductor in interstate commerce.

Defendant alleges that the said M. G. Toops was killed through no negligence, omission, inattention or want of care on its part or on the part of any of its officers, servants, agents or employes, but that his death was due to his own negligence, omission and want of care.

Defendant further says that the said Toops received the injuries which resulted in his death while in the employ of the defendant as a conductor and that such injuries were the result of the risks of his employment which was assumed by the said M. G. Toops and for which the defendant is not liable.

2

The jury are instructed that the law provides that every common carrier by railroad, while engaged in commerce between any of the several states or territories, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of death of such employe to his or her personal representative, for the benefit of the surviving widow and children of such employe for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier.

[fol. 68] In this case the liability, if any, of the defendant is for the benefit of the surviving widow and child of the said M. G. Toops.

The law further provides that where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

3

The jury are instructed that the burden is on the plaintiff to prove, by a preponderance or greater weight of all the evidence in the case, that she is entitled to recover in this

action, and that in order to recover the plaintiff must prove, by a preponderance or greater weight of the evidence, that the death of the said M. G. Toops was the direct and proximate result of the alleged negligence of the defendant or its employes.

The jury are further instructed that the burden is on the defendant to prove, by a preponderance or greater weight of the evidence, the alleged contributory negligence of the said M. G. Toops.

By a preponderance or greater weight of the evidence is not necessarily meant the evidence of the greater number of witnesses but is meant such evidence as taken in connection with all the facts and circumstances in the case best satisfies the minds of the jurors.

4

The jury are instructed that if you find that the death of the deceased was the proximate result of the alleged negligence of the defendant's employes, and you further find that said injury and death were not due to the risk of danger [fol. 69] which he had assumed, as defined in these instructions, and you further find that the deceased was not guilty of contributory negligence, then your verdict will be for the plaintiff; if you also find that the deceased was guilty of contributory negligence you will then consider the question of contributory negligence for the purpose of determining how much the damages should be diminished by reason of such contributory negligence, and deduct from the amount of damages found such amount as you believe, from the evidence and the instructions herein, should be deducted on account of the contributory negligence of the deceased.

5

The jury are instructed that by the term "proximate cause" is meant that which naturally leads to and might have been expected to be directly instrumental in producing the injury and death, and by the term "proximate cause" is meant that result which naturally and ordinarily follows as the direct result of the act or omission under consideration.

In order for the injury and death to be found to be the proximate result of any specific negligence it must be found that such injury and death would not have occurred except for such negligence.

6

The jury are instructed that the alleged negligence of the deceased hereinbefore referred to is what is known in law as contributory negligence; and contributory negligence implies two things, first, a want of ordinary care on the part of the person injured, and second, approximate connection between this want of ordinary care and the injury complained of.

7

[fol. 70] The jury are instructed that ordinary care means such care as a person of ordinary prudence would exercise under the same or similar circumstances, and the failure to use such ordinary care is negligence.

8

The jury are instructed that the defendant railway company is not an insurer of the safety of its employes, and is not liable for mere accidents, but the defendant is liable in damages only in case you find that the defendant, its servants or employes were negligent, as alleged by the plaintiff, and that the negligence of the defendants or its servants or employes was the proximate cause of the death of the said M. G. Toops; and in this case if you find that the said M. G. Toops was negligent and that his negligence contributed to his death you will then reduce the amount of recovery in accordance with Instruction No. —.

9

The jury are instructed that an employe such as the deceased was, assumes the risk of danger incident to the occupation in which he voluntarily engages so far as these dangers are not attributable to the employer's negligence, and no recovery can be had on account of any injury which was the result of such assumed risk, but that the employe has a right to assume that his employer has exercised rea-

sonable care and he is not to be held as assuming the risk arising from sudden and unfor-seen circumstances not ordinarily incident to his employment. The risk assumed by an employe is the risk of such danger as the employe is aware of or a danger which is so plainly observable that he may be presumed to have known of it, and in order to [fol. 71] hold an employe for an assumption of risk attributable to the employer's negligence, it must appear not only that the employe knew of the risk caused by the negligent act of the employer, but that he knew it endangered his safety, or that such dangers must have been so obvious that an ordinarily prudent person, in the exercise of ordinary care under the circumstances, woud have appreciated such dangers.

10

The jury are instructed that while the deceased M. G. Toops assumed the risks of inherently dangerous methods of doing the work of switching and making up trains, he did not assume any increased risk attributable, not to the method, but to negligence in pursuing it.

In this connection you are further instructed that if you believe from the evidence that the said train at the time of the injury to the deceased, was being made up in the ordinary method and that the deceased was acquainted with said method, then the deceased assumed the risk attributable to the method of making up such train but did not assume the risk of increased danger by reason of negligence in pursuing a known method of making up the train.

11

The jury are instructed that the observance or non-observance of the rules of the defendant company as to the operation of its train, is not conclusive as to the negligence or care of the defendant company or its employes but is only a circumstance to be taken by the jury for what they may think it is worth in determining whether or not the defendant's employes were negligent in the operation of said train at the time in question.

[fol. 72] 12

The jury are instructed that it was the duty of the defendant company in operating its said engine and cars in and upon the tracks at Rolla, Kansas, to use ordinary care to protect the said M. G. Toops from injury, and to furnish a reasonably safe method and place of work; and in determining what would constitute such care you have a right to take into consideration the kind and situation of the cars, the manner in which they were switched onto the elevator track, the position occupied by the said M. G. Toops, the speed of the engine and cars, the time of the day or night, the light or darkness of the night, the ability to see and discern the movement of the cars, the position of the other members of the train crew; whether or not there was a member of the crew or a light on the front or west end of the cars moving onto the elevator track, and every fact and circumstance in evidence relating to the question including the condition of the tracks at Rolla, Kansas; and if you believe from the evidence and all the attending and surrounding circumstances and conditions that the means used by the defendant company, its agents and employes, as disclosed by the eivdence, did not constitute ordinary care on the part of the defendant and its agents and employes, then such failure would constitute negligence on the part of the defendant company.

13

The jury are instructed that the love of life in every human being is so strong that the presumption in this case is that the deceased did all that a reasonably prudent person would have done, with his knowledge of the situation, which presumption is controlling, unless you find that the evidence shows that he did not do all that a reasonably prudent person should have done. In other words every [fol. 73] man is presumed to exercise ordinary care for his own protection such as is exercised by an ordinarily prudent person, unless there is evidence to the contrary, and you will follow this rule.

14

The jury are instructed if you find for the plaintiff in this case, that the measure of damages is the pecuniary

value of the life of M. G. Toops, deceased, during its prospective continuance and is brought for the benefit of some certain person or persons, to-wit, in this case, the wife and daughter of M. G. Toops, deceased. It is purely and entirely a money or financial loss. How much money has Mrs. Toops and her daughter been deprived of by reason of the death of their husband and father, computing the same at its present worth or value? It is not a question of how much the father could have made for his own use had he lived out his allot-ed time, but is the present value of the sum his wife and daughter might reasonably have expected to receive from his earnings during their life for the limit of time within which they could expect to receive financial aid from their husband and father during the time they could reasonably be expected to live. You must not undertake to give the equivalent of the value of human life. You will allow nothing for the suffering or sorrow of either Mr. Toops, or Mrs. Toops, and her daughter. You must not attempt to punish the railway company, but endeavor to give a fair and reasonable pecuniary value for the continuation of the life of the deceased to his wife and daughter. Therefore, you will consider what sum of money paid at the present time in a lump sum would represent the fair value of what the wife and daughter had a reasonable right to expect under all the circumstances to receive from the earnings of their husband and father had he lived until their [fol. 74] death. As a basis upon which to make your estimate, it is proper for you to consider the wages which Mr. Toops was receiving, his age and health, what portion of his earnings he was devoting to the care and maintenance of his wife and daughter. You will consider his habits, his prospect of life, his industry and skill, the business in which he was engaged, and his hazards as to life. You will consider how much of his earnings he spent on himself either for necessities or for purposes as distinguished from what he spent for the maintenance and care of his wife and daughter because the part of his wages that he spent on himself or for purposes other than those that contributed to the care and support of his wife and daughter, would be entirely eliminated from your calculations.

There is another limitation upon the amount that you will allow for damages and that is this: You will allow only the present value of what you may find the wife and daugh-

ter have lost in money because of the death of their husband and father, for they are receiving now in a lump sum that which they would have received from time to time during a future period if Mr. Toops had not been killed. By this you are not to understand that you are to ascertain the number of years that the contributions to Mrs. Toops and her daughter would probably continue and then multiply such number of years by the amount of such probable yearly income, but you are to give a sum of money that will represent the present value of such contributions. The evidence you have heard as to the probable duration of life of Mrs. Toops and her daughter based on the mortality tables of insurance companies, is not conclusive upon the question of the duration of their lives. Such tables are submitted to you, not to control you but merely to guide you. They are based upon averages and there is no certainty that any person will live the average duration of life. [fol. 75] If you find that the defendant company, its agents, servants or employes, are chargeable with negligence, you should first consider the question of damages without relation to the question of contributory negligence. If you find that the plaintiff's intestate was guilty of contributory negligence, it would then be your duty to reduce the amount of damages in proportion thereto since the law under which this action was brought provides that the damages shall be diminished in proportion to the amount of negligence attributable to the injured employe.

I instruct you that this instruction means this: If you find that the negligence of the railway company and Mr. Toops is equal, that is, that the railway company was guilty of negligence, and the plaintiff's intestate was guilty of equal negligence that contributed to the injury, you will reduce the damages one-half. If you find that Mr. Toops was guilty of more negligence than the railway company, then the damages should be reduced by more than one-half; and if you find that he was guilty of less negligence than the railway company, then the damages should not be reduced as much as one-half.

15

Certain questions will be submitted to the jury which you will answer and sign by your foreman in case your verdict is for the plaintiff.

The jury are instructed that in answering these questions you will be governed solely by the evidence in the case without regard to your general verdict.

16

The jury are the sole and exclusive judges of all the facts in the case and of the credibility of the witnesses; you have the right in determining the weight and value of the evidence to take into consideration the feelings, motives, pas- [fol. 76] sions and prejudices of the witnesses, their interest in the result of the suit, where any is shown, their manner on the stand while giving their testimony, their memory and knowledge of the things about which they testify, and every fact and circumstance in evidence and occurring at the trial, which tends to contradict or corroborate any witness, and then give to the several parts of the evidence such weight as they seem to merit.

VERDICT

On April 25, 1928, the jury returned a verdict in favor of the plaintiff and against the defendant for the sum of $22,750.00, and also made the following

SPECIAL FINDINGS OF FACT

Q. No. 1. Was M. G. Toops, the deceased, in charge of the train and switching operations at and before the time he was killed?

A. No. 1. Yes.

Q. No. 2. a. Was M. G. Toops killed by coming into contact with the fifteen grain cars that were being placed on the elevator track?

b. If you answer the preceding question "Yes," state which car, if any, struck Toops.

A. No. 2. The first car on west end of the fifteen grain cars.

Q. No. 3. Were there any marks of blood on the rear car of the fifteen grain cars?

A. No. 3. There was no direct evidence to show there was or was not.

Q. No. 4. Were there marks of blood on the south wheels of all the other grain cars except the rear car?

A. No. 4. Yes.

Q. No. 5. Did Toops know of the coming on the elevator track of the fifteen grain cars?

A. No. 5. He knew they were to come.

[fol. 77] Q. No. 6. Was Conductor Toops supplied with a good lantern?

A. No. 6. He had a good lantern.

Q. No. 7. If you answer Q. No. 6 in the affirmative then state if he could have by the aid of said lantern seen the approaching cars.

A. No. 7. No.

Q. No. 8. Had not Toops formerly worked on the Elkhart branch from Dodge City to Elkhart?

A. No. 8. Yes.

Q. No. 9. Had the yards at Rolla, Kansas, been materially changed since he worked on said line?

A. No. 9. We don't know.

Q. No. 10. State fully in what the negligence of the defendant consisted, if any.

A. No. 10. First, in not protecting rear end of fifteen grain cars; second, in engineer not sounding signal when starting.

Motion to Set Aside Special Finding

The defendant filed a motion to set aside the answer to special qeustion No. 7 for the reason that the same was contrary to and not supported by the evidence. Overruled.

Motion for Judgment Notwithstanding the Verdict

The defendant moved the court to render judgment in its favor notwithstanding the verdict, because all the evidence in the case shows that plaintiff was not entitled to recover. Overruled.

[fol. 78] MOTION FOR A NEW TRIAL

Within three days after the rendition of the verdict the Railway Company filed its motion for a new trial upon all the statutory grounds. Overruled.

JUDGMENT

On May 26, 1928, the court rendered judgment in favor of the plaintiff and against the defendant on the general verdict of the jury.

The foregoing is a true and correct abstract of the record in the above-entitled case.

SPECIFICATION OF ERRORS

The District Court erred,

1. In the admission of certain evidence offered by the plaintiff over the objections and exceptions of the Railway Company.

2. In overruling defendant's demurrer to the plaintiff's evidence.

3. In rejecting certain evidence offered by the Railway Company.

4. In overruling defendant's motion for a directed verdict.

5. In giving certain instructions to the jury.

6. In overruling defendant's motion to set aside answer to Special Question No. 7.

7. In overruling defendant's motion for judgment in its [fols. 79 & 80] favor notwithstanding the verdict.

8. In overruling defendant's motion for a new trial and in rendering judgment in favor of the plaintiff and against the defendant on the general verdict of the jury.

William R. Smith, Owen J. Wood, Alfred A. Scott, Alfred G. Armstrong, All of Topeka, Kansas; Wm. Osmond, of Great Bend, Kansas, Attorneys for Appellant.

[fol. 81] File endorsement omitted

[fol. 82] In Supreme Court of Kansas

No. 28,499

Mabel G. Toops, Administratrix of the Estate of M. G. Toops, Deceased, Appellee,

vs.

The Atchison, Topeka an Santa Fe Railway Company, Appellant

Counter Abstract of Appellee—Filed Jan. 7, 1929

Appellant's abstract of the testimony introduced in this case is correct except as to several important matters, and for that reason we have made the following counter abstract:

Mr. Nolan testified (T. 51) that the elevators were located on the south side of the elevator track; that the elevator farthest east was just a little west of the depot; and that to the best of his recollection there was one ele- [fol. 83] vator on each side of the road crossing. Nolan was called back in rebuttal, and appellant has failed to abstract his rebuttal testimony. It is set forth in the transcript at page 158. He testified that there was a road crossing right west of the depot, and that it was a crossing which they were required to keep open.

Jud Benson testified on page 118 of the Transcript in answer to a question as to what difference the rate of interest would make in the amount required for an annuity, as follows:

"A. I believe I do have some tables, come to think about it, at my office, at four per cent, but that probably wouldn't add to the thing any It would probably be $150 difference in the entire table. One-half of one per cent would probably make that much difference.

Q. You say it would only make a difference of about $150.00?

A. Yes, sir; that is about it."

I. R. Bryan, a witness for the plaintiff, testified as follows (T. 132):

"Q. Where is that photograph we introduced yesterday, attached to the deposition. (Procures deposition.) Now, I will ask you to look at this photograph, Defendant's Exhibit 6, and state whether that shows about what the condition was there?

A. Well, it looks similar to the tracks there; yes, sir.

Q. That is your idea of what a gallon is?

A. I don't see any dirt at all between those ties.

Q. You don't see any dirt at all between those ties?

A. No, sir; I don't.

Q. What would you call this? (Indicating.)

A. I would call it weeds.

Q. Now——

A. In other words, thistles."

[fol. 84] The testimony of J. B. Robinson, one of the defendant's witnesses, is as follows (T. 155):

"Q. You would not consider you were doing your duty to back them in where the trainmen couldn't see the end of the train, would you?

A. We usually try to keep in touch with each other.

Q. Do you consider it your duty to back a train in where you couldn't see the end of that train and could not know whether there was anyone on the track or not?

A. I would back a train—If I knew that the track would hold ten cars and I had five, so far as the hazard was concerned, why, I don't think that it would be necessary to walk back to the end of the train. That isn't the practice.

Q. It isn't the custom to back cars in where you can't see the end, without somebody to protect whoever might be on the track, whether there is a roadway there or not, is it?

A. No, sir; it isn't."

The findings of fact returned by the jury as set forth both in Appellant's abstract and in its brief, are correct except-

ing only No. 10, which question and answer should read as follows:

QUESTION No. 10 AND ANSWER

"Q. No. 10. State fully in what the negligence of the defendant consisted, if any.

A. No. 10. 1st, in not protecting rear end of 15 grain cars. 2nd, in engineer not sounding signal when starting to back cars around curve and through cut. 3rd, poor condition of track at derail switch."

EXCERPTS FROM RULE BOOK

The following are definitions and rules taken from the Rule Book introduced in evidence:

Definition of a station (Rule Book, page 6):

"Station.—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave [fol. 85] the main track; or from which fixed signals are operated."

Definition of a yard (Rule Book, page 6):

"Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations."

Rule 24 (Rule Book, page 18).

"When cars are pushed by an engine (except when shifting or making up trains in yards), a white light must be displayed on the front of the leading car by night."

Rule 102 (p. 30):

"When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."

Rule 320 (p. 65):

"Trainmen and Yardmen, before switching or moving cars at stations, must ascertain that there are no persons or property on or about the same that might be injured or damaged by so doing."

Rule 381 (p. 72):

"Conductors of freight trains are required to do their work thoroughly at stations, bearing in mind that trains are run to do the business of the road and not merely to make time over it. Trains, however, are expected to run with regularity and as nearly on time as the prompt performance of work and rules will permit."

Rule 396 (p. 76):

"They must do such switching as shall be necessary in taking cars for their own trains or in leaving cars from the same. Local freight trains are generally to do necessary switching at stations, but any freight train may, in case of necessity, be called upon by Station Agents for such work, and the same will be performed. Conductors when at stations doing work will at-end personally to the switch-[fol. 86] ing unless engaged in checking the unloading of way-freight as provided in Rule 389, when they may allow Brakeman, if competent, to do the switching."

Rule 398 (p. 76):

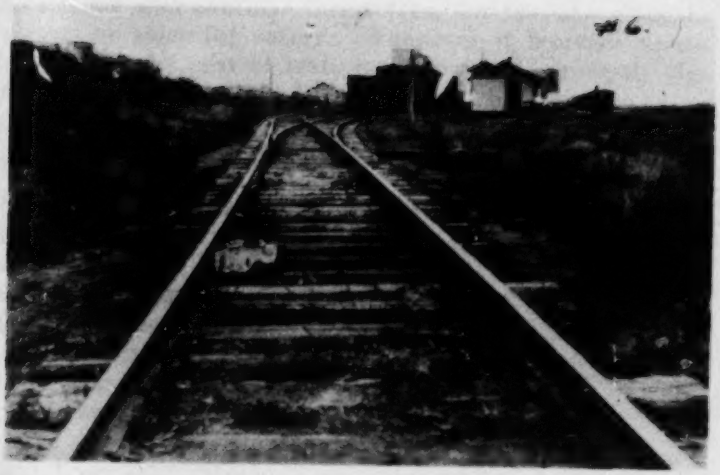
"When cars are taken on at intermediate stations, they must be carefully examined. They must see that cars already on siding, as well as those set out by them, are safely and properly left. Cars or engines must always clear the main or other adjoining tracks a safe distance."

Rule 471 (p. 85):

"They must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of derailing switches and know they are right before at-empting to pass them."

Rule 473 (p. 85):

"They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14 (1)." (Rule 14 provides for two distinct whistles.)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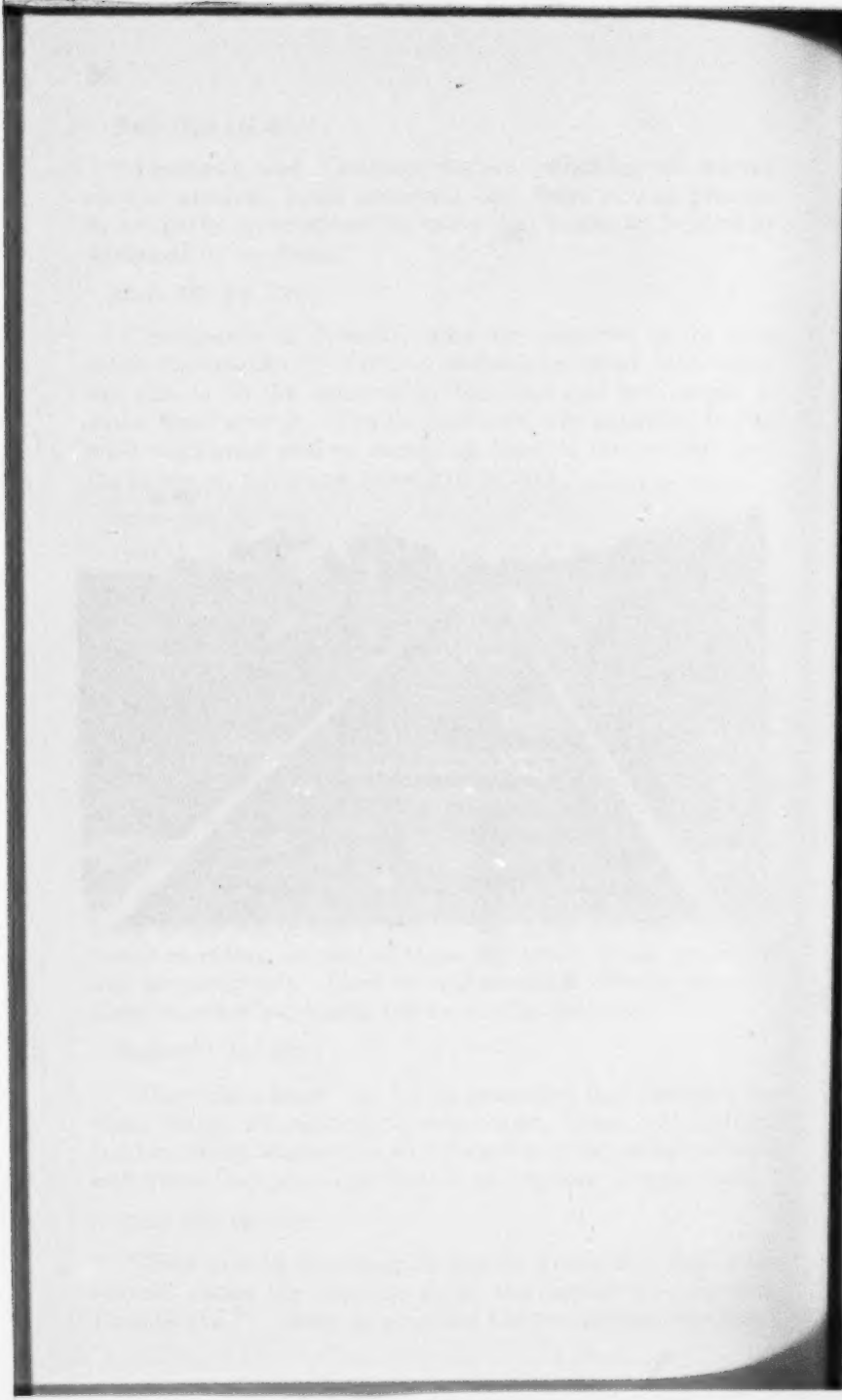


Rule 478 (p. 85):

"They will use great care in backing up to take a train, or backing into a siding to take or leave cars, and will approach so slowly that couplings can be made without injury to persons or property."

Rule 483 (p. 86):

"They will take into consideration that the lives of passengers and trainmen, as well as the property of the company, are entrusted to their care, and it is fully expected and required that they will not only attend to all signals and instructions, but also that they will, on all occasions, be vigilant and cautious themselves, not trusting alone to signals or rules for safety. Whenever it becomes necessary to protect rear of train engin-man will promptly signal flagman as per Rule 14 (c)."

Appellant's abstract omits the following re-direct examination of Mr. Hemphill (T. 76):

[fol. 87] "Q. I will ask you if Rule 102 doesn't read as follows: 'When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need?'

A. I think it reads that way; yes, sir.

Q. That is the rule?

A. Yes, sir; I think so."

Exhibit 6, identified by Mr. Nolan (T. 53) and by Mr. Bryan (T. 132), we believe should be before the court, and we are therefore attaching a copy of that exhibit.

EXHIBIT No. 6

(Here follows exhibit)

[fol. 88] The foregoing picture taken by the Railroad Company immediately after the accident, was taken looking westward along the elevator track from a point about 15 feet east of the derail where Conductor Toops' body was found. It also shows a part of the high bank along the south side of the track, about which the witnesses testified. Appellee's Exhibit 5, we believe also shows clearly the

layout out the tracks at the station of Rolla, and we are attaching a copy of that exhibit.

EXHIBIT No. 5

(Here follows exhibit)

[fols. 89 & 90] This picture was taken by the appellee sometime after the accident happened, but there had been no changes made in the yards at the time it was taken. It was taken from a point east of the cross-over switch, and shows the cross-over switch, the high bank on the south side of the track, and the elevators on the elevator track toward which the switch operations were directed. It shows the station house at Rolla and gives a very clear idea of the general layout of the tracks over which the switching operations were being conducted.

The transcript in this case has been filed with the Clerk of the Supreme Court, and the various exhibits have been at-ached thereto for the use of the court if necessary.

The foregoing is a true and correct abstract of the record in the above entitled case.

Carr W. Taylor, James N. Farley, of Hutchinson, Kansas, At-orneys for Appellee.

[fols. 91 & 92] Minute entry of argument and submission January 10, 1929, omitted in printing.

[fols. 93 & 94] IN SUPREME COURT OF KANSAS

No. 28,499

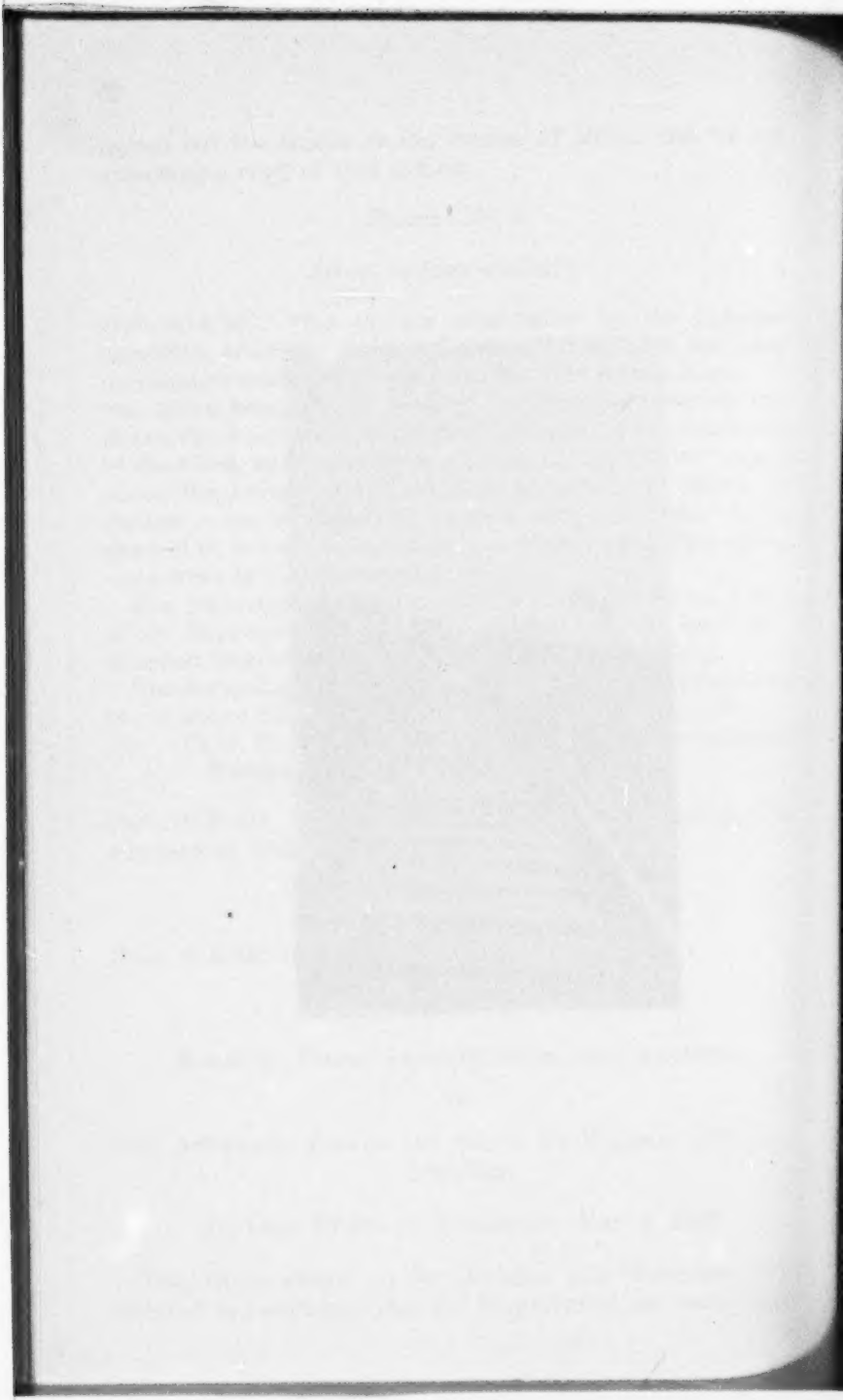
MABEL G. TOOPS, Administratrix, etc., Appellee,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant

JOURNAL ENTRY OF JUDGMENT—May 4, 1929

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below



be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereon let execution issue.

[fol. 95] IN SUPREME COURT OF KANSAS

No. 28,499

MABEL G. TOOPS, as Administratrix of the Estate of M. G. Toops, Deceased, Appellee,

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant

Syllabus by the Court

1. Master and Servant—Federal Employers' Liability Act—Evidence—Sufficiency to go to Jury. In an action under the federal employers' liability act by a widow, as administratrix, to recover for the death of her husband, the evidence considered and held sufficient to require submission to the jury.
2. Same—Sufficiency of Evidence to Support Judgment. And further, the evidence held to have been sufficient to uphold the jury's findings of negligence on the part of defendant and to support the verdict and judgment.
3. Appeal and Error—Review—Necessity for Presentation to Trial Court. Alleged errors not brought to the attention of the trial court cannot form a basis for review in an appellate court.
4. Master and Servant—Instructions. Complaint of instructions and that plaintiff was not properly appointed administratrix, considered and not sustained.

Appeal from Reno District Court, William G. Fairchild, Judge

Opinion Filed May 4, 1929. Affirmed

William R. Smith, Owen J. Wood, Alfred A. Scott, Alfred G. Armstrong, all of Topeka, and William Osmond, of Great Bend, for the appellant.

Carr W. Taylor and James N. Farley, of Hutchinson, for the appellee.

OPINION—Filed May 4, 1929

The opinion of the court was delivered by

HOPKINS, J.:

The action was one under the federal employers' liability act by a widow, as administratrix, to recover for the death of her husband. Plaintiff prevailed, and defendant appeals.

The facts were substantially these: M. G. Toops had been in the employ of the defendant railway company since 1913. For several years prior to August 12, 1926, he had been in passenger service running out of Kansas City. The middle of August of that year he was transferred to Dodge City as freight conductor from Dodge City to Elkhart. (He had not run on this line for some thirteen years.) On August 12, 1926, with a crew consisting of himself as conductor; Nolan, head brakeman; Hemphill, rear brakeman; Hall, engineer, and Phillips, fireman, he ran from Dodge City to Elkhart. They passed through Rolla in the after- [fol. 96] noon, but did not stop. They started on the return trip from Elkhart about eleven o'clock the night of August 12, picked up four empty cars at Wilburton, and arrived at Rolla between 12:30 and 12:45 the morning of August 13. The train consisted of about thirty cars.

The main line of the defendant railway company through Rolla runs approximately east and west. There was a passing track north of the main-line track, 1,600 or 1,700 feet in lenth, and another passing track, 800 feet in length, south of the main-line track and south of the depot, which was also south of the main-line track. South of the last-mentioned passing track was a third track which ran to two elevators, which were south and west of the depot. For convenience we will denominate this the elevator track. Crossing all the tracks west of the depot and passing between the elevators was a public road.

Upon arrival at Rolla the train stopped, with the engine just west of the depot. Hemphill and Toops, who were riding in the caboose, got out and walked toward the front

of the train, one on either side. They had orders to pick up five loaded grain cars which were at the elevators on the elevator track and to take fifteen empty grain cars from the north passing track and spot them at the elevators on the elevator track. Nolan, who had been riding the front of the train, took the engine with the four empty cars picked up at Wilburton, went east on the main line, backed on to the elevator track and picked up the five loaded grain cars. Hemphill went across to the elevator track and assisted Nolan in connecting up the loaded grain cars. Having done so, they went on east, got on the main line track and then backed west to a coupling with the train, Toops making the connection with the air hose. Nolan, Hemphill and Toops met on the station platform and went over the switch list together.

The grain cars on the north passing track were in two sections, four or five of them west of the public road crossing. East of the grain cars on the passing track were twelve stock cars. There was a cross-over switch from this north passing track to the main line about 900 feet east of the depot. The stock cars were foul of the cross-over switch, and in order for the engine to get on the north passing track to connect up with the empty grain cars it was necessary for it to go to the east end of the passing track, back into the stock cars, push them back and couple [fol. 97] onto the grain cars. Nolan went east with the engine, backed in on the north passing track and coupled into the east end of the stock cars.

Hemphill left Toops, went from the main line north to the passing track and coupled up the stock cars with the grain cars. Toops remained on the station platform, going through his switch list. After coupling with the grain and stock cars they all (except Toops) proceeded east on the north passing track out on the main line. Nolan last saw Toops alive on the platform at the time the grain cars were pulled out on to the main line. Hemphill last saw him alive on the east end of the platform with his lantern on a truck and his train book in his hand, looking through his switch list. He was run over and killed at a derail on the elevator track about 300 feet east of the depot by the grain cars which were "kicked in" on such track by the train crew. There was a rather sharp curve in the ele-

vator track where it left the main line. It went through a cut, the bank of which on the south side was close to the elevator track and eight or ten feet high. A person on the elevator track at the derail mentioned could not be seen by the engine or train crew at the point where the "kick in" was made.

The principal question for our consideration is whether under all the facts and circumstances there was sufficient evidence to take the case to the jury and to sustain the jury's finding that the defendant was negligent in the manner in which it "kicked in" the cars.

The jury answered special questions as follows:

"1. Was M. G. Toops, the deceased, in charge of the train and switching operations at and before the time he was killed?

"A. Yes.

"2a. Was M. G. Toops killed by coming into contact with the fifteen grain cars that were being placed on the elevator track?

"2b. If you answer the preceding question 'yes,' state which car, if any, struck Toops.

"A. The first car on west end of the fifteen grain cars.

"3. Were there any marks of blood on the rear car of the fifteen grain cars?

"A. There was no direct evidence to show there was or was not.

"4. Were there marks of blood on the south wheels of all the other grain cars except the rear car?

"A. Yes.

"5. Did Toops know of the coming on the elevator track of the fifteen grain cars?

"A. He knew they were to come.

"6. Was Conductor Toops supplied with a good lantern?

"A. He had a good lantern.

"7. If you answer Q. No. 6 in the affirmative, then state if he could have by the aid of said lantern seen the approaching cars.

"A. No.

"8. Had not Toops formerly worked on the Elkhart branch from Dodge City to Elkhart?

"A. Yes.

[fol. 98] "9. Had the yards at Rolla, Kan., been materially changed since he worked on said line?

"A. We don't know.

"10. State fully in what the negligence of the defendant consisted, if any.

"A. First, in not protecting rear end of fifteen grain cars. Second, in engineer not sounding signal when starting to back cars around curve and through cut. Third, poor condition of the track at the derail switch."

The defendant contends that the plaintiff failed to show many essential facts necessary to entitle her to go to the jury on the issues. To determine the correctness of this contention requires a careful review of what evidence had been adduced. The facts narrated above are not in dispute and need not be repeated.

A book of rules prepared by the defendant and issued to trainmen for their government in handling of trains was introduced in evidence. Some of these rules are pertinent here. And it is perfectly clear they were not followed.

"Station.—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated.

"Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations."

Under the evidence Rolla is a "station."

"Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need.

"Sec. 320. Trainmen and yardmen, before switching or moving cars at stations, must ascertain that there are no persons or property on or about the same that might be injured or damaged by so doing.

"Rule 381. Conductors of freight trains are required to do their work thoroughly at stations, bearing in mind that

trains are run to do the business of the road and not merely to make time over it. Trains, however, are expected to run with regularity and as nearly on time as the prompt performance of work and rules will permit.

"Rule 396. They must do such switching as shall be necessary in taking cars for their own trains or in leaving cars from the same. Local freight trains are generally to do necessary switching at stations, but any freight train may, in case of necessity be called upon by station agents to do such work, and the same will be performed. Conductors when at stations doing work will attend personally to the switching unless engaged in checking the unloading way freight as provided in rule 389, when they may allow brakeman, if competent, to do the switching.

"Rule 483. They will take into consideration that the lives of passengers and trainmen as well as the property of the [fol. 99] company, are intrusted to their care, and it is fully expected and required that they will not only attend to all signals and instructions, but also that they will, on all occasions, be vigilant and cautions themselves, not trusting alone to signals or rules for safety. Whenever it becomes necessary to protect rear of train, enginemen will promptly signal flagman as per rule 14 (c).

"Sec. 473. They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in rule 14. (Rule 14 provides for two distinct whistles.)

"Sec. 478. They will use great care in backing up to take a train or backing into a siding to take or leave cars, and will approach so slowly that couplings can be made without injury to persons or property.

"Sec. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

Under the rules it was the duty of Conductor Toops to assist in the switching operations; it was his duty personally to see that the cars were spotted at the respective elevators as called for by the switch list which he was examining when last seen by Nolan and Hemphill; to see that

there were no obstructions on the track; that the road crossing west of the depot was left open; that the brakes were properly set to hold the cars at each one of the elevators. The performance of these duties required him to be on the south side of the elevator track, the elevators being on that side, and also the engineer's side of the train. There was a path on the south side of the main line eastward from the depot. It is the theory of the plaintiff that Conductor Toops followed that path to a point north of the derail and then started south to cross over the elevator track.

The elevator track at the derail was skeletonized. A witness stated there was possibly a "gallon" of dirt between the ties. Thistles and weeds had grown up between the ties and obscured the actual condition of the track. The route suggested by the plaintiff is the nearest and most practical one from the depot platform where Toops was last seen to where his body was found. No eyewitness saw him meet his death. His body was found between the rails of the elevator track at the derail. His shoulders were upon, and jammed against, the derail, his body lying diagonally across the track between the rails, with his feet to the north and east toward the north rail. His head and right arm were mached off, and with his hat were lying south of the south rail of the elevator track near the derail. His lantern and lead pencil were lying near together, south of the elevator track about two or three feet away from the [fol. 100] south rail of the track, his lead pencil lying between his lantern and the south rail. His train book was found lying in the center of the track between the rails. The surface of the track between the rails showed clearly that the body was dragged westward two or three feet until his shoulders were jammed against the derail. Three or four cars passed over his body and were standing west of the derail where they stopped from lack of momentum.

As before noted, the train crew, except Toops, had gone east on the main line with the train. The night was so dark that during the switching operations the men could not be seen any considerable distance. Their respective positions were discernible only by the light from their lanterns. Neither the engineman nor brakemen, from their positions, could be seen around the curve on the elevator track on account of the cut and the bank above mentioned. Hemphill gave the kick-in signal to Nolan and the engineman.

An attempt at a kick-in was made but was not successful because the condition of the road was such that Nolan was unable to get on the train and cut the grain cars from the stock cars. Nolan testified:

"I was slow about getting on and I missed the pin. I was slow on account of the condition of the track. There were weeds there and the tracks were skeletonized and bad footing along there."

Here it is contended that the crew was derelict in its duty. Nolan gave a second kick-in signal. The cut was successfully made. Instead of one of the brakemen riding the kicked-in grain cars, according to the rules, both remained with the engine and the stock cars. The kick-in sent the fifteen grain cars west down the mainline track and on to the elevator track with no one on them to control them or stop them in case of danger. No light was on the front end of the moving cars; no kick-in or push signal was given by the engineer by blowing the whistle nor was the bell rung as a warning to any person who might be on the elevator track or anyone who might be crossing the tracks. Each of these omissions was a flagrant breach of the rules devised by defendant itself for the protection of its train crews.

It is argued that the deceased was in charge of the train crew; that he planned out the switching operations, which were carried forward under his orders; that he told Hemphill he would watch out for the grain cars, and therefore it is not reasonable to suppose that he would expect a kick-in signal or that one of the trainmen would ride in the kick-in cars, or place a lantern at the rear car to indicate the cars [fol. 101] were coming; that since the stock cars were to be returned to the north passing track after the grain cars were kicked-in, Toops knew that neither brakeman would ride the grain cars. The contention is not sound. In the first place, there is nothing in the record to indicate by reasonable inference or otherwise that the deceased expected the crew to do its work other than in accordance with the company's rules. Second, there is nothing upon which to base the assumption that the deceased had any reason to believe that one of the brakemen would not ride the kicked-in grain cars. Nor is there any evidence to show

that Toops knew the stock cars were foul of the cross-over switch. It was too dark for him to see them or note their position. Had they been east of the cross-over switch the engine would have backed in and coupled with the grain cars. Testimony by Hemphill concerning the conversation follows:

"The last time I saw Mr. Toops before his death, he was standing at the east end of the platform station on the platform. I did not at that time have any talk with him. Before that I had talked with him. He was coupling up the air hose on these four or five cars that we picked up that were coupled on to the train; he was coupling the air hose up on them, and I walked down the south side of the passing track to this crossing to make that joint, and while Mr. McHenry was bringing the engine through the stock track I was standing at the crossing on the north side of the main line talking to Mr. Toops; he was on the south side of the main line, and he asked me if these fifteen cars were all in one cut and I told him they were, and that I would kick them all into the elevator track. He said, 'All right, I will look out for them.'"

The fact that Toops knew the cars were coming does not, in our opinion, relieve the defendant of liability for the negligent manner in which the cars were sent in on to the elevator track. He did not know that they would be kicked in without a signal from the engineer; he did not know that they would come silently down upon him without a white light on the leading car; he did not know that they would come down upon him without a brakeman in control thereof and in a position on the end of the car where he could see persons upon the track and protect them from the danger. It must be assumed that Toops was familiar with the rules and likewise had a right to believe that his brakemen and enginemen were familiar with them; he had a right to believe that the rules would be observed by each one of his trainmen; it was but natural for him to make the attempt to cross over the track because no warning of any kind had [fol. 102] been given that the cars were approaching. He had a right to rely upon the requirements of rule 473 (supra) which provided that in rounding all curves where the view is obscured, a whistle shall be sounded twice, noti-

fying him that the cars had been kicked-in on the elevator track. Engineer Hall testified:

"It is usual for the engineer to give a signal when he is starting up a train on a kick signal."

The deceased was not familiar with the elevator track; he approached it in the dark from the north for the first time in thirteen years. He is presumed to have been exercising due care and it may therefore be assumed that when he arrived at the track and attempted to cross it he listened for signals and heard none; that he looked for approaching cars with a light and saw none and that he stepped upon the defective track for the purpose of crossing over and instantly became aware that the kicked-in cars were upon him, but on account of the defective condition of the track it was impossible for him to escape; that in making an effort to escape he was knocked down, and as he fell forward his hat, lantern and pencil were propelled to the south side of the track. On account of the curve in the track his lighted lantern (which was thrown or fell out of his hand while falling) could not be seen by the crew. The position of the body indicates that he was knocked down by the west end of the moving grain cars. His train book containing 34 or 35 bills dropped into the center of the track between the rails and was lying two or three feet east of his body.

McMullen v. Railway Co., 107 Kan. 274, 191 Pac. 306, was in many respects similar to the instant case. McMullen was a brakeman for the Santa Fe, and was working at the yards at Emporia, helping make up a freight train. It was his duty, when the train was made up, to go to the rear end of the train and close the stop cock and couple up the air hose. The evidence showed that it was customary for trainmen in making up trains in yards to have recourse to the method of kicking-in cars. McMullen knew of these things. He was found dead. No one saw the accident. The jury found the train crew guilty of negligence. A verdict was rendered for plaintiff and affirmed by this court. It was a no-eyewitness case. Conductor Toops is presumed to have been exercising reasonable care. There is no evidence to the contrary. He is presumed to have been acting in the line of his duty which required him at some time or [fol. 103] other to be in the position where he was found.

In the McMullen case (supra) it was said in the opinion (pp. 280, 281):

"Counsel for the defendant in their brief say:

" 'There was no eyewitness to the accident nor was there any testimony as to how it occurred. It may be assumed, however, that very shortly after the conductor and brakeman left the way car, he left the car and closed the angle cock and at that time the cars were kicked in on track 4, and by the impact, while he was between the rails on track 4, and at the rear end of the way car, was knocked down and run over. This assumption is based entirely on the situation appearing after the accident. * * * The duty of the conductor and brakeman of the train crew was to examine the seals and check the cars in the train, and that of McMullen was to close the angle coach, hang up the tail hose, and couple up the air hose in the train. This was usually done after the train was made up and just before or after the road engine was attached to the train. Although from what he told Doctor Eckdall, it was not the proper time to do so, he thought it had to be done and he would perform that duty while the train was being made up.'

"From all this testimony and the rules of the company referred to, and the condition of affairs assumed by counsel for defendant, it seems unreasonable to hold that McMullen was not engaged in the performance of his duty when injured, or that he was not located and engaged as the switch crew knew he or some other brakeman ought to be.

"While it may not have been the duty of the switch crew to keep a lookout under ordinary circumstances for a member of the train crew attending to the air couplings, the violent collision caused by the wrong signal and its effects were such as to make it a question for the jury whether such operation was negligent or not. (Saar v. Railway Co., 97 Kan. 441, 155 Pac. 954.)

"But it is urged that the negligence on which the jury based the verdict was other than that alleged in the petition. We hold, however, the charge that the switch engine and cars were shoved at a dangerous rate of speed and run with great force and violence without warning against the other cars of the train, causing the way car suddenly and violently to move backwards over the body of McMullen, fairly includes the cause of such alleged violence,

which was the transmission of the wrong signal. (Linker v. Railroad Co., 82 Kan. 580, 109 Pac. 678.)

"It is also urged that the deceased assumed the risk, thereby exonerating the defendant. In Spinden v. Railway Co., 95 Kan. 474, 148 Pac. 747, we held that in an action under the federal employer's liability act it was error to instruct that the assumption of risk could only be established by showing that its danger was so glaring that a person of ordinary prudence would not have attempted it. In the opinion it was said:

" 'The employee is not regarded as assuming unknown or unappreciated risks arising from his employer's neglect, unless they are so obvious that an ordinarily prudent person would observe and appreciate them.' (p. 476.)

"The federal supreme court in Seaboard Air Line v. Horton, 233 U. S. 492, held that congress in enacting this legislation based the action upon negligence only, and excluded responsibility of the carrier to its employees for defects not attributable to negligence. Touching risks not naturally incident to the occupation it was said:

[fol. 104] " 'These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.' (p. 504.)"

(See, also, Reese v. Phila. & Reading Ry., 239 U. S. 463; Ches. & Ohio Ry. v. De Atley, 241 U. S. 310; Ches. & Ohio Ry. v. Proffit, 421 U. S. 462; Chicago, R. I. & P. Ry. Co. v. Ward, 252 U. S. 18.)

It is contended that the deceased "assumed the risk involved in the operation." We believe that the condition of the track and the manner in which the train crew kicked-in the fifteen cars were not risks which Toops assumed. There was no evidence that he knew it was a custom of this train crew or of any train crew to kick-in cars at stations in the manner in which these were kicked-in. There was some testimony that it was the custom to kick-in cars in making up trains, but we believe the inference can fairly be drawn that that had reference to the making up of trains in yards and not to switching operations at way stations.

As before noted, the evidence was that Rolla was not a yard. The defendant's rules specify that when cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the leading car at night (rule 24) or a flagman must be on the front of the leading car by day. (Rule 102.)

In 39 C. J. 692 it is said:

"Risks which arise from the negligence of the master or those representing him are not 'ordinary risks' incident to the employment, but are 'extraordinary risks.' Hence, under the general rule as to extraordinary risks, but subject to the limitations hereinafter considered, risks which result from the negligence of the master, that is to say, those risks which are avoidable by reasonable care on his part, are not assumed by the servant. The master, in the proper performance of his duties as such, is bound to exercise care and prudence to prevent his employees from being subjected to unreasonable risks or dangers, and to agree by implication of law not to subject a servant employed by him to extraordinary or unusual perils, and the servant has the right to assume that the master will perform his duty in this respect, except to the extent that the rule may be modified as to risks that are so open and obvious that a man of ordinary prudence would see and appreciate them; and it is very generally declared that the risk assumed commences only after the master has exercised due care in the performance of the duties which the law casts upon him." (See, also, 18 R. C. L. 676, 677.)

The defendant cites and relies on Salisbury v. Atchison T. & S. F. Rly. Co., 125 Kan. 131, 263 Pac. 791. The facts in that case are entirely different from those in the instant case. The plaintiff there testified:

[fol. 105] " 'I was struck in the back by the train. I don't know what part of the train struck me * * * Something that stood out past the cars hit me. I do not know what it was. The train kept going on after it hit me. I didn't know what it was that hit me. I did not see a thing that struck me' " (p 133.)

In the Salisbury case the court quoted from Douglas v. Mitchell's Ex'rs, 35 Pa. 443, as follows:

"'As proof of a fact the law permits inferences from other facts, but does not allow presumptions of fact from presumptions. A fact being established, other facts may be, and often are, ascertained by just inferences. Not so with a mere presumption of fact. No presumption can with safety be drawn from a presumption; there being no fixed or ascertained fact from which an inference of fact might be drawn, none is drawn.'" (p. 135.)

Here several physical facts established by the evidence clearly show how Conductor Toops met his death. It is proper, therefore, to draw inferences from those physical facts. The fact that the track was skeletonized and dangerous, especially in the nighttime unless great care was used by the person crossing over it to avoid falling; the fact that the lantern was lying in the weeds three or four feet south of the track and the conductor's lead pencil was between it and the south rail; the fact that his head, arm and hat were on the south side of the track; the fact that his train book with thirty-four or thirty-five bills in it was lying in the center of the track about three feet away from his body; the fact that his body had been dragged down the center of the track two or three feet until the shoulders were jammed against the derail, are all physical facts from which proper inferences may be drawn as to how the death occurred.

In the Salisbury case, supra, it was observed that—

"With the presumption that the injured employee used due care goes the correlative presumption that the employer used due care. This presumption must be overcome by evidence. When circumstantial evidence is relied on to prove a fact, the circumstances must be proved. The circumstances must not themselves be presumed, and one presumption cannot be built upon another." (p. 134.)

The presumption that the defendant employer in the instant case used due care was overcome by the evidence.

It is argued that there was no evidence to support the claim that the deceased was struck by the west end of the fifteen moving grain cars, but that he must have attempted

to climb to the top of the train and somehow or other have fallen between the first and second moving cars. The argument is not reasonable. The physical facts from which a reasonable inference must follow indicate that the deceased was struck by the west end of the cars. For instance, the position in which his lan- [fol. 106] tern, hat and pencil were found. He was right-handed. Inasmuch as he had come south to cross the track it is natural to conclude that when he was struck his pencil and lantern were thrown out and away from the track. His train book, with the bills in it, was found in the center of the track between the rails and east of his body, indicating that he was carrying the train book in his left hand at the time he was struck, and dropped it in the center of the track. Had he attempted to climb on the train and fallen off, the train book would undoubtedly have been found in his pocket. His body wsa dragged between the rails for a distance of two or three feet. It is argued with much emphasis that the deceased could not have been struck by the first car because there was no blood on the wheels of that car. The contention does not appeal to us for several reasons. First, there was testimony by a physician showing that "in a crushing injury where a railroad car wheel or engine mashes off a member it mashes up the issue so badly, including the blood vessels, that there is no bleeding immediately following, like there would be if it was cut off with a sharp instrument." Second, the position in which the body was lying, with shoulders on the derail, breast up, legs and feet extending north across the track and a little to the east, the head and right arm having been mashed off and the arm found west of the head; the scraping of the dirt and gravel in the roadway, showing that the body had been dragged, considered altogether, give evidence of the fact that the deceased was struck, knocked down and dragged or rolled by the first car, but that the wheels of the second car were the first to actually run over the body. On the other hand, if he had attempted to climb on the moving train and had fallen, he would naturally have fallen outside the rails. His body would not have been inside the rails and lying across the roadbed.

The defendant argues that it was not the custom and practice to have a brakeman at the rear end of the cars

which the crew were moving in switching operations, but it says that "the protection of the public is a very different proposition, and with regard to the public the rule probably is that in switching at night there should be a brakeman or flagman on the rear car with a light; but in this case the cars were not approaching a public crossing nor any like place." The last statement disregards the fact [fol. 107] that there was a public road crossing over all of the tracks just west of the depot and running between the elevators where the grain cars were to be spotted.

A number of cases are cited by the defendant in support of the theory that the giving of signals by the ringing of a bell or blowing of a whistle would cause confusion and is therefor- not required. The difficulty with defendant's contention in this regard is that this accident happened at a station and not within a "railroad yard." The defendant's argument is entirely correct so far as it applies to railroad yards. In the instant case the very signals, the lack of which is claimed as negligence, might, if given, have prevented the tragedy. The ringing of the engine bell or whistling from the engine could not have been confusing because there was no other engine moving at the station. A proper whistle would have apprised the deceased that the cars were "kicked" back.

The main contention of the defendant is that there was no prima facie case for a jury, a contention we cannot sustain. This is not one of those cases where we can say as a cold-blooded matter of law that there was no negligence and no liability. The physical facts, the evidence and the fair and reasonable inferences to be drawn therefrom were, in our opinion, sufficient to justify the conclusion reached.

The defendant contends that the verdict ($22,750) was excessive, a contention with which we might be inclined to agree but for the fact that the defendant appears to be in no position at this time to raise the question. No complain of the amount of the verdict was made by the defendant in its motion for new trial nor in its specifications of error. Under the oft-repeated rule that alleged errors not presented to the trial court cannot be considered here, we are unable to go into this phase of the controversy.

Complaint of the instructions and that the plaintiff was not properly appointed administratrix by the probate court

of Douglas county have been considered but cannot be sustained. Nor is it necessary to add discussion of those questions to an already lengthy opinion.

The judgment is affirmed.

Marshall and Hutchison, JJ., dissenting.

IN SUPREME COURT OF KANSAS

DISSENTING OPINION

BURCH, J. (dissenting:

The action was based on the federal employers' liability act. The case is governed by federal law. The judgment [fol. 108] must stand up, if at all, under the decisions and the method of review of the supreme court of the United States. The opinion of this court makes no reference to decisions of the federal supreme court touching any phase of the case except the subject of assumption of risk, which I do not regard as important. If I read the federal decisions correctly, the judgment of the district court should be reversed.

The jury found defendant was negligent in not protecting the rear end of the fifteen grain cars. The opinion of the court approves the finding because neither brakeman nor white light was on the west end of the grain cars, and conductor Toops had a right under the rules to believe and rely on the fact that one of his brakemen would ride the kicked-in grain cars, the brakeman taking a position on the west end of the first car, where his light could be distinctly seen. The rules supposedly creating this duty were rules 24 and 102.

Conductor Toops knew perfectly well that no brakeman with a light would be on the end grain car to show him the string of grain cars was coming, because he planned the work so his brakemen would of necessity be otherwise employed, and in planning the work he was the company.

The first work done was to get five loaded grain cars from the elevator track and put them into the train. Toops made the air coupling. The train was then made up, but there was switching to do. Toops and his two brakemen went over the switch list. The instructions were to get

fifteen empty grain cars, which were behind twelve stock cars, off the passing track, and place the grain cars at the elevators for loading. The head brakeman went east with the engine to open and close switches and make the engine couplings. The rear brakeman stayed behind to make the coupling of cars back at the road crossing. This done, engine, stock cars and grain cars all went eastward, and both brakemen went with them. The grain cars were to be kicked in on the elevator track, the stock cars were to be replaced on the passing track, and the engine was them to be attached to the east end of the string of grain cars in order to push them to the elevators. The head brakeman's duties did not contemplate that he should leave the engine standing idle, get on the rear grain car, ride it back to show Toops the string of grain cars was coming, and then walk back, to throw the switches so the stock cars could be replaced, and after that the engine could be attached to the grain cars. The rear brakeman was obliged to take care of the stock cars after they were kicked back on the pass- [fol. 109] ing track, and he could not get on the rear grain car and ride it back to show Toops the string of grain cars was coming, without holding up the work. Toops had but two brakemen. The train was to be put over the road that night, and it would have been the essence of nonsense for Toops to take either brakeman from his proper employment and assign to him the duty of riding the rear car of the string of grain cars, lantern in hand, back to where Toops was waiting for them, just to show Toops they were coming. That practical application of the rules required no such absurdity was disclosed by the following testimony for plaintiff:

"And while Mr. McHenry was bringing the engine through the stock track, I was standing at the crossing on the north side of the main line, talking to Mr. Toops; he was on the south side of the main line, and he asked me if these fifteen cars were all in one cut, and I told him they were, and that I would kick them into the elevator track. He said, 'All right, I will look out for them.' "

Toops knew perfectly well that neither of his brakemen carried two lanterns, one to work with and the other to be put on the rear end of the string of cars to show Toops they

were coming. Of course there was no need of a light to protect the public crossing west of the station, because Toops was on guard looking out for the cars some 300 feet east of the station.

It was not Toops' duty merely to assist in the switching operations. Rule 396 required him to attend personally to the switching, since he had no unloaded way freight to check. He was in full charge of the switching operations, not theoretically, as a matter of rule, but as a matter of fact. One of plaintiff's witnesses testified:

"If he tells me to do something as a brakeman, it is my duty to do it; and if he tells Hemphill to do something, it is Hemphill's duty to do that; and if he tells the engineer to do something, it is the engineer's duty to do it. The conductor has entire charge of the switching operations, and the others simply work under him."

The result is, protection of the rear end of the fifteen grain cars goes out of the case as a basis of recovery, because the company was not negligent toward Toops in that regard.

The second ground of negligence found by the jury was failure of the engineer to give a signal when starting to back the cars. What was the purpose of such a signal? Manifestly, the purpose was to apprise a person who might not anticipate a backward movement of the train that such a movement was about to begin, and would result in sending cars in on the elevator track.

At the time the signal should have been given the end of [fol. 110] the string of grain cars was east of the junction of the elevator track with the main track, the stock cars were east of the grain cars, and the engine was at the east end of the string of stock cars. The curve and the embankment intervened between the end car of the string of grain cars and the place Toops chose to meet it. A sounded signal would be far away. Time would elapse before the end car would reach Toops and, signal or no signal, he would necessarily be obliged to be on the lookout for approach of the expected cars. So rule 483 applied to Toops. That rule required him to be vigilant and cautious, and not trust alone to signal or rule of safety. He had sent the engine and brakeman eastward for the express purpose of kicking

the grain cars upon the elevator track. They were certain to arrive after sufficient time to complete the preliminary operations and then perform the kicking operation. There was in fact delay. The engineer gave the cars a kick, and stopped. The slack ran out, and it was discovered the grain cars were not detached. New signals were given, a second kick was made, and the grain cars were cut off. In anticipation of their approach, Toops went to a proper place to meet them. When the end car approached him it was moving slowly, because inertia very soon brought it to rest, and the presumption is Toops was vigilant and cautious, and watched carefully for approach of the very cars he went to the switch track to meet.

The jury found that Toops had a good lantern, but the jury found he could not see the cars with it (finding No. 7). The two brakemen had no difficulty in finding cars and switch stands and safely making couplings with their lanterns, one of which was like the one Toops carried. Toops said he would look out for the grain cars. As indicated, he knew there would be no brakeman with a lantern and no white light to show him the end car of the fifteen grain cars. Signal or no signal, he had to find the grain cars with his lantern. He knew and the jury knew he was equipped to do so, and the seventh finding of the jury would be ludicrous if the subject to which it relates were not so serious. The court's opinion properly indulges the presumption that when Toops arrived at the switch track he looked for the approaching grain cars, but the court's hypothesis that he did not see the end of the grain car which immediately struck him is quite as unsupported by evidence as the jury's finding.

Under federal law the employer must not only be negligent, but the proof must show that the negligence caused the [fol. 111] injury. (St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265, 281; C. M. & St. P. Ry. v. Coogan, 271 U. S. 472, 478.) In this instance there is no evidence that failure of the engineer to give a signal before he kicked the grain cars upon the elevator track had anything to do with the accident.

The third element of defendant's negligence found by the jury was the poor condition of the track. A photograph of the track taken the day after the accident is in the record.

The question fairly arises whether the jury was competent to declare defendant negligent in providing the kind of track disclosed by the photograph and the testimony, and whether Toops did not assume the risk of using skeletonized elevator tracks at small stations on the Dodge City-Elkhart branch line; but waiving this matter, there was no evidence the condition of the track had anything to do with Toops' death.

Nolan said he was slow about making the cut for the first kick because of the condition of the track—bad footing. The conclusion that Toops was killed because of bad track is on a par with the reasoning of a witness for plaintiff. The witness opined the accident might have been caused, not by lack of ballast, nor by weeds, nor by skeletonized track, but because of a spike not fully driven down. The witness testified:

"He could have caught his foot on a spike. There is a spike sticking in there just close to where he laid on the inside of the rail. * * * I didn't see anything to indicate that he fell on a spike, but he was there, and the spike was there."

All the proof there is in the record that the condition of the track caused the accident is that the track was bad and the man was found dead upon it. To conclude the condition of the track caused the accident involves a spurious use of the *res ipsa loquitur* doctrine instead of speculation, in determining cause, a method specifically condemned by the supreme court of the United States in an opinion published April 15, 1929. (Louisville & Nashville Railroad Co. v. Chatters, Advance Opinion No. 414, p. 8.)

The court's explanation of the accident is as speculative as it is schematic. It is assumed without evidence that Toops did not reach the place of the accident until just as the rear grain car arrived. Under this assumption Toops would have run into the side of the string of grain cars but for the failure of the first kick of the engine to send them in on the elevator track. To the first assumption is [fol. 112] added another, having no basis in the evidence, namely, that Toops stepped on the track in front of the moving end car, which he looked for and could not see, on his watchful way to the south side of the elevator track. Then

follow assumption after assumption, until the fanciful account of the accident is complete. The end of the first car struck Toops; his agility was handicapped by the skeletonized track, his feet were trapped, and he was knocked down; he threw his lantern and pencil to a place beside the track, with his right hand; he dropped his train book, which he held in his left hand, between the rails; then with his hands free, he was helpless, and suffered fatal mutilation. Attorneys for plaintiff go so far as to give us the workings of his mind while facing his doom. They say he threw his lantern to the side of the track for an emergency signal, which nobody could see, and the court does not relinquish the view that Toops actually threw his lantern into the weeds beside the track.

It will be recalled that Toops' hat was found beside the track with the lantern and pencil. Did he throw his hat there as he did the lantern and pencil? If so, with which hand? Or did the hat fall there, and if it did, why may not the lantern and pencil have fallen there?

The lantern was from three to four feet south of the south rail of the track. The hat was nearer the rail, and the pencil still nearer. Conceive of a yardstick poked under the overhang of a large-size grain car, with one end against the rail. The other end of it would be in the midst of the articles mentioned, and it is just as reasonable to assume that the articles fell at the side of the car as that they were thrown from a place on the track at the end of the car by a man suddenly knocked down.

The court says that if Toops had been on the car and had fallen down, his train book would have been in his pocket. One easy guess is that maybe the train book was in a pocket when the terrible encounter commenced which ended with the headless body jammed against the derail.

The court says that if Toops had attempted to climb on the moving cars and had fallen, he would naturally have fallen outside the rails. I am not familiar with the law of nature which would prevent him from falling partly outside the rails and partly between the rails.

At some time Toops left the station platform, where he was last seen, and went to the switch track, where he was [fol. 113] killed. He was in the midst of unfamiliar surroundings. The night was very dark, and after traveling

about 100 yards, he was to approch the elevator track for the first time in thirteen years. Just why he should carry his pencil in his lantern hand, and his trainbook with thirty-four or thirty-five bills in it in his left hand, to meet a cut of kick-in cars which he was to take care of, has never been explained. Book and pencil in separate hands could not help him find the way, or find the cars on the switch track, or be of use to him when he reached the switch track, or be of use to him when he began to do what was necessary to take care of the cars. The articles might be a hindrance to him in doing his work, something which an experienced and prudent man would guard against. A common sense view would be that when he was ready to go he stuck his pencil under his hat the way conductors do, put his billbook in his pocket, took his lantern in the hand he used by force of habit, and proceeded to the place where he had planned to be. Any way, there would have been nothing fantastical about this kind of conduct, and if he did conduct himself in that manner, it requires no more invention to explain what followed than appears in the court's opinion.

To render the court's theory of the accident tenable, it is indispensable that Troops should have been struck by the west end of the west grain car, knocked down and then killed. The theory has been that he was killed practically as soon as he was knocked down. Some physical facts rationally considered refute the theory. Paintiff's witnesses testified there was no blood on any of the four south wheels of the west car, and that there was blood on the south wheels of all other grain cars. In plaintiff's brief it is said that, "blood was found on all of the cars except the first car on the west end of the string of fifteen cars."

The jury's evasive answer to the third interrogatory discloses the candor which it displayed in disposing of the case. A witness who examined the car wheels both the night of the accident and the next morning testified there was flesh as well as blood on the wheels, and nobody corrected or contradicted him. His testimony is important, and follows:

"We examined the trucks of the freight cars that night, and then made another examination the next morning. We found no marks of blood on the first car. The first marks of blood we found on them were on the west end, west wheel, on the south side of the second car. Following these

cars up to the engine, we found blood on every wheel, blood and flesh on every wheel up to the tender, up to and including the tender.

[fol. 114] "I crawled under the cars the next day, just under the first two. I made this examination at the request of Mr. Shull, the claim agent of the Santa Fe, and Doc Ellis. It was made in the morning. Doctor Ellis was the doctor that was called before we moved the body, before anybody would touch it. The doctor requested that we look the ground over thoroughly, because we would all be called, and that we would more than likely be called on the coroner's jury."

To prevent the jury from drawing from the physical facts the natural and inevitable inference that Toops was killed by the first wheel of the second grain car, plaintiff produced a physician who gave the following testimony:

"In a crushing injury where a railroad car wheel or railroad engine mashes off a member, it mashes up the tissues so bad, including the blood vessels, that there isn't any bleeding immediately following it, like there would be if it was cut off with a sharp instrument."

When Toops was killed the grain cars were moving so slowly they stopped within a short distance. The head brakeman testified as follows:

"To the best of my judgment, the west end of those fifteen cars was about three or four car lengths west of the derail."

This testimony must be true, because the evidence was uncontradicted that the east car of the string of grain cars stopped within two or three car lengths of the elevator track switch, and the sketch, drawn to scale, submitted as illustrative of the station grounds, indicates the string would not be long enough to reach five car lengths beyond the derail.

It is a matter of common knowledge that the head is supplied with blood by large arteries ascending on each side of the neck, that the blood is returned by large veins, and that arteries and veins have brances and ramifications supplying the various tissues. Toops' head was severed,

and his right arm was mangled and severed. To do this it was necessary that the car wheel pass through arterial and venous blood. The physician would make of a car wheel and a steel rail such deft instruments that crushed major arteries and veins in crushed tissues would be sealed up so that no blood could escape—immediately. The doctor's testmony did not cover the subject of crushed tissue adhering to the wheel that crushed it. We have then this operation: The first car wheel does its dexterous work. The car moves on five or six feet—whatever the distance between the wheels of the front truck. The second wheel of the front truck comes through clean because the blood [fol. 115] cannot start to flow. The car rolls slowly on some twenty-five feet—or whatever the distance between the trucks of a 40-foot grain car. The first wheel of the rear truck passes over the place of severance. Still no bleeding. The car moves on, and the last wheel of the car comes in contact with no blood. The car rolls on for the distance between the rear wheel of the front car and the front wheel of the second car. Then is the time for bleeding to commence and flesh to adhere, and they do so.

In cases of this character the supreme court of the United States examines the record, determines for itself what is substantial and what is unsubstantial testimony, and does not permit a jury question to be raised by unsubstantial testimony. (Gulf, etc., R. R. v. Wells, 275 U. S. 455.) I fear the supreme court of the United States would not regard the physician's testimony as making a substantial contribution to the solution of the case.

Since the theory that the first car killed Toops forces the facts, the court falls back on the second car. Toops comes down to the switch track, and fortuitously steps on the track just as the west end of the first car reaches the exact locality. The west end of the first car strikes him, and he makes distribution in space of lantern, pencil, hat and train book. He is knocked down, but all the first car does is to push him maybe two or three feet, possibly roll him some. The second car then comes along and kills him. Besides nullifying the court's approval of the doctor's testimony regarding postponed exudation of blood, this will be a great surprise to plaintiff's attorneys.

The petition alleged that Toops was struck by the kicked-in cars, was knocked to the ground between the rails at a point three or four feet [two or three feet] east of the derail, and his body dragged until his shoulders rested against the derail. The petition then stated:

"That his head and right arm had fallen in such manner that they lay across the south rail of the elevator track and were severed from his body by the wheels of the rear car of said kicked-in cars; * * *"

The brief for plaintiff contains the following, printed in italics: "The petition contains our theory of the case, and the evidence amply sustains our theory."

The brief does depart a little from the petition. The petition states that Toops was knocked down, that his body was dragged, but that his head and arm had "fallen" so they were severed. The brief says:

[fols. 116 & 117] "His head fell over the south rail, as did his arm. We are not clear as to whether the front wheels severed his head and arm, or whether it was the rear wheels of the first car."

There was evidence the body was dragged westward a little way, and that the severed arm lay about three feet west of the severed head. There is not even a scintilla of evidence that the first car did the dragging. Finding the court's conjecture respecting a vital matter at odds with the conjecture upon which plaintiff commenced, tried and won the case, I am content to close with the observation that the decisions of the supreme court of the United States forbidding a jury to speculate on cause of accident are so numerous citation of them is superfluous.

[fols. 118-141] Petition for Rehearing, covering 23 pages, filed May 23, 1929, omitted from this print. It was denied and nothing more by order July 5, 1929.

[fol. 142] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER DENYING REHEARING—July 5, 1929

Now comes on for decision the motion for a rehearing of this appeal; and thereupon it is ordered that said motion for a rehearing be denied.

[fol. 143] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 144] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Kansas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,434. Kansas Supreme Court. Term No. 303. The Atchison, Topeka and Santa Fe Railway Company, petitioner, vs. Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased. Petition for writ of certiorari and exhibit thereto. Filed August 6, 1929. File No. 34,434.